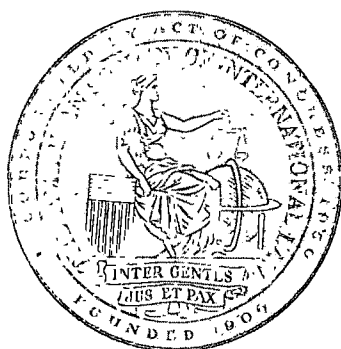


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THE AUTHORITY OF THE UNITED NATIONS TO ESTABLISH AND MAINTAIN A PERMANENT UNITED NATIONS FORCE

BY LOUIS B. SOHN

Harvard Law School

The establishment of the United Nations Emergency Force (UNEF) during the Middle Eastern crisis in November, 1957, has been generally accepted as being a proper exercise of the powers of the United Nations. Proposals have been made, however, to establish a more permanent force, either on a full-time or stand-by basis, for use in future emergencies. It seems desirable, therefore, to investigate the legal problems involved in the establishment of such a permanent force, composed either of national contingents or volunteers.

I. POWER OF THE UNITED NATIONS TO ESTABLISH A U.N. FORCE

A. The Power of the Security Council

The Security Council was given by the Charter wide discretion in respect of steps to be taken to maintain or restore international peace and security. The debates at San Francisco show clearly the desire to grant to the Council all the powers necessary to enable it to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace.¹ In the execution of enforcement measures, the Council may even "intervene in matters which are essentially within the domestic jurisdiction of any state."² The Members of the United Nations have agreed "to accept and carry out the decisions of the Security Council," provided they have been made "in accordance with" the Charter.³

In an emergency situation falling under Chapter VII of the Charter, the Council has a choice of three types of action: It may call upon the

¹ For an analysis of the problems involved in the establishment of the United Nations Emergency Force, see the Report of the Committee on Study of Legal Problems of the United Nations in 1957 Proceedings of the American Society of International Law, pp. 206-229.

² Pearson, "Force for U.N.," 35 Foreign Affairs 395, 401-402 (1957); Foreign Minister of Pakistan (Mr. Firaz Khan Noon), statement before the General Assembly on Nov. 29, 1957, 11th Sess., Official Records, Plenary Meetings, p. 417; Hammarskjöld, in the Introduction to the Annual Report of the Secretary-General on the Work of the Organization, 1956-1957, General Assembly, 12th Sess., Official Records, Supp. No. 10 (Doc. A/3594/Add. 1), pp. 1-2.

³ U.N. Charter, Arts. 1, 24, 39. See United Nations Conference on International Organization, Documents, Vol. 12, pp. 502-514.

⁴ U.N. Charter, Art. 2, par. 7.

⁵ *Id.*, Art. 25.

parties concerned to comply with "such provisional measures as it deems necessary or desirable"; it may decide "what measures not involving the use of armed force are to be employed"; or it may take "such action by air, sea or land forces as may be necessary."⁶

It may be argued that the Security Council could establish a U.N. Force under any one of these three headings. The Council may consider that such a Force is necessary to ensure compliance with provisional measures ordered by it. For instance, having ordered a truce, the Council may establish various subsidiary organs to supervise its observance: a commission, a corps of military observers, a truce supervision organization, and even a Force of a para-military or military character. Such a Force would differ from the other supervisory institutions only in the number of people employed, as all these institutions have employed both military officers and uniformed guards for the performance of their functions.

It is also conceivable that the Council may decide that the use of a U.N. Force for such purposes as patrolling a frontier or occupying a disputed zone would not constitute a measure "involving the use of armed force" but, on the contrary, should be considered merely as a measure designed to prevent the use of armed force by others; accordingly it may use its authority under Article 41 to "decide what measures not involving the use of armed force are to be employed to give effect to its decisions." It may be noted that the measures under that article do not depend on the prior conclusion of agreements under Article 43.

Finally, and this seems to be the most likely situation, the Security Council may establish a U.N. Force under Article 42. While action under that article "may include" operations by forces of Member States, the language of that article does not preclude the use of any other forces available to the Council. Only the use of national forces depends on the prior conclusion of special agreements pursuant to Article 43; this limitation does not apply to any forces which the Council might be able to obtain by some other method.

On the other hand, a strong argument could be made for the proposition that the measures enumerated explicitly in Chapter VII are the only ones permitted and that the Security Council cannot take any other measures, not contemplated by those who drafted the Charter. The International Court of Justice has, however, recognized in the advisory opinion concerning "Reparations for Injuries Suffered in the Service of the United Nations" that the United Nations

must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties.⁷

As the forces contemplated by Articles 43 and 45 of the Charter have not been established, it might be considered essential to establish a limited substitute Force able to perform at least some of the functions assigned by the Charter to the missing forces.

⁶ *Id.*, Arts. 40-42.

⁷ [1949] I.C.J. Rep. 174, 182.

Thus it seems possible to envisage the establishment and use of a U.N. Force by the Security Council, and the only obstacle to the use of this method is the requirement of unanimity of the permanent members of the Security Council for any such action.⁸

B *The Power of the General Assembly*

Though the Charter confers on the Security Council "primary responsibility for the maintenance of international peace and security,"⁹ it does not confer on it "exclusive" jurisdiction in respect thereof. On the contrary, the Charter empowers the General Assembly to "consider the general principles of co-operation in the maintenance of international peace and security," and to "make recommendations with respect to such principles to the Members or to the Security Council or to both."¹⁰ Under this grant of powers the General Assembly could certainly adopt a set of regulations defining the principles which should govern the establishment, training, organization, command and use of any forces put at the disposal of the United Nations. It could then recommend to Members that they take such steps as may be necessary to implement these principles. If any Member State should then agree to implement them, no other Member State could validly contend that the action of the Assembly or of the complying state constitutes a violation of the Charter.

On the other hand, it is necessary to make clear that no recommendation of the General Assembly binds a Member State and that any Member State can refuse to comply with a recommendation that it contribute personnel, arms, bases or assistance to a U.N. Force.¹¹

It is necessary to distinguish, therefore, between the general, quasi-legislative recommendations of the General Assembly, stating in advance principles applicable to any Force to be used by the United Nations, and a particular recommendation that Member States make available to the United Nations specified armed forces. Only the first kind of recommendation is authorized by the express language of paragraph 1 of Article 11 of the Charter.

⁸ Even the Soviet Delegation seems to agree that the Security Council could establish a U.N. Force; it raised objections, however, to the establishment of the U.N. Emergency Force by the General Assembly. General Assembly, 1st Emergency Spec. Sess., Official Records, Plenary Meetings, p. 127. For a broad interpretation of the powers of the Security Council to establish an international armed force for Palestine, see the working paper of the U.N. Secretariat of Feb. 9, 1948, U.N. Doc. A/AC.21/13, pp. 7-11.

⁹ U.N. Charter, Art. 24.

¹⁰ *Id.*, Art. 11, par. 1.

¹¹ But a state is not entitled simply to ignore a recommendation of the Assembly and it is at least bound to explain to the Assembly why it cannot comply with the recommendation. States must give due consideration to the recommendations of the Assembly; their discretion to refuse compliance is always limited by their duty, under para. 2 of Art. 2 of the Charter, "to fulfil in good faith the obligations assumed by them in accordance with" the Charter. Cf. the separate opinion of Judge Lauterpacht in the case of the "Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South-West Africa," [1955] I.C.J. Rep. 67, 117-120.

Section C of the Uniting for Peace Resolution,¹² which provides a method for the establishment of "armed forces which could be used collectively,"¹³ falls clearly within the scope of paragraph 1 of Article 11, which authorizes the General Assembly to "consider the general principles of co-operation in the maintenance of international peace and security" and to "make recommendations with regard to such principles to the Members" of the United Nations. Section C is limited to an invitation to each Member State

to survey its resources in order to determine the nature and scope of the assistance it may be in a position to render in support of any recommendations of the Security Council or of the General Assembly for the restoration of international peace and security.¹⁴

In this resolution the General Assembly seems to assume that each Member would be able to make some contribution, however small, to such assistance, and this assumption can be justified by the obligation, under paragraph 5 of Article 2 of the Charter, to "give the United Nations every assistance in any action it takes in accordance with" the Charter, *i.e.*, in this case, in accordance with Article 11 thereof.

The Assembly further recommended that

each Member maintain within its national armed forces elements so trained, organized and equipped that they could promptly be made available, in accordance with its constitutional processes, for service as a United Nations unit or units, upon the recommendation by the Security Council or General Assembly.

This general directive seems also entirely consistent with the language and spirit of paragraph 1 of Article 11. It is equally in harmony with the spirit of the Charter as a whole which requires all Members to make such contribution to the maintenance of peace as is within their means, thus uniting their strength "to save succeeding generations from the scourge of war" through "effective collective measures."¹⁵

While each Member is given complete discretion with respect to the steps to be taken to implement this provision of the resolution, it would be entirely inconsistent with its obligation under the Charter itself to refuse

¹² Res. 377 A (V) of Nov. 3, 1950, General Assembly, 5th Sess., Official Records, Supp. No. 20, pp. 10-12 (Doc. A/1775); 45 A.J.I.L. Supp. 1 (1951). It does not seem necessary to discuss here all the problems raised by the Uniting for Peace Resolution, as only some of its provisions are relevant to the subject of this memorandum. For a discussion of these problems see J. Andrassy, "Uniting for Peace," 50 A.J.I.L. 563-582 (1956); L. M. Goodrich and A. P. Simons, *The United Nations and the Maintenance of International Peace and Security*, pp. 406-423, 430-433 (Washington, 1955); H. Kelsen, *Recent Trends in the Law of the United Nations*, pp. 953-990 (London, 1951). It may be noted that the Soviet Union, in the Middle East crisis of 1956, acquiesced in the use by the General Assembly of its powers under the Uniting for Peace Resolution, at least in a case of an attack by one state on another. The Soviet opposition to the action of the Assembly in the Hungarian question was not related to the Uniting for Peace Resolution, but was based primarily on the ground that an issue of domestic jurisdiction was involved there.

¹³ Res. 377 A (V); last par. of Preamble.

¹⁴ *Ibid.*, par. 7.

¹⁵ U.N. Charter, Preamble and Art. 1. See also Arts. 43, 45.

to make any contribution whatsoever. On the other hand, it would be permissible for a Member to make its contribution subject to such conditions as it may deem necessary; for instance, a Member could limit the availability of its troops to cases in which the Security Council had ordered the use of armed forces under Article 42 of the Charter. The obligation to furnish forces under that article cannot be entirely destroyed by the lack of the special agreements required by Article 43, and it seems quite appropriate for the General Assembly to point the way for the implementation of the general obligation under Article 42 when such agreements have not been concluded. Section C of the Uniting for Peace Resolution thus removes the procedural obstacle of Article 43, the lack of special agreements between the Security Council and Members; it provides Members with an opportunity to fulfill their original obligations through unilateral declarations rather than agreements.

Once a Member, in accordance with its constitutional processes, has made a unit or units of its armed forces available for United Nations service, its consent to the use of such troops under the Uniting for Peace Resolution could be revoked only under conditions specified in its notification of the availability of such forces or in general regulations adopted by the Assembly. An unconditional promise to make them available could not be revoked, except with the consent of the United Nations.

The Uniting for Peace Resolution has thus provided a workable plan for the establishment of a U.N. Force composed of contingents, to be earmarked in advance by Member States, and to be available not only upon the recommendation of the Security Council, but also upon recommendation by the General Assembly.⁹ Unfortunately, no attempt has been made to use the favorable atmosphere which accompanied the adoption of the resolution (by 45 votes against 5, with 7 abstentions) for its prompt implementation. The replies of Member States to a request by the Collective Measures Committee (established also by the Uniting for Peace Resolution) for information as regards the action taken under Section C of the Resolution were quite disappointing.¹⁰ But even where conditional pledges were given, no steps were taken by the United Nations to ensure their execution once the conditions had been fulfilled; for instance, after the conclusion of the armistice in Korea, no attempt was made to ascertain whether Members whose pledges were conditioned upon the termination of hostilities in Korea had earmarked the promised troops for United Nations use.

Thus, when the emergency arose in the Middle East, the United Nations seems to have proceeded on the assumption, not entirely justified, that no forces were available to it under the Uniting for Peace Resolution and that the needed U.N. Emergency Force must be established on a new basis. The decision to establish that Force was also based on the Uniting for Peace Resolution, but it seems that this decision was based on Section A

⁹ For a tabulation of these replies, see First Report of the Collective Measures Committee of 1951, Annex II; General Assembly, 6th Sess., Official Records, Supp. No. 13, pp. 37-48 (Doc. A/1891).

rather than on Section C of that resolution.¹⁷ Section A authorizes the General Assembly, "if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace," to make

appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed forces when necessary, to maintain or restore international peace and security.¹⁸

Though it may be argued that the U.N. Emergency Force does not constitute an armed force of the kind envisaged in this resolution, the establishment of that Force may be considered to fall within the scope of the phrase "collective measures." Thus, if the Security Council, in the exercise of its primary responsibility, could have created such a Force under Chapter VII of the Charter, the General Assembly could "recommend" its creation through the exercise of its secondary responsibility.

Both Sections A and C of the Uniting for Peace Resolution envisage primarily the use of armed forces against an aggressor, and assert the right of the General Assembly to recommend their use in case of a breach of the peace or act of aggression. The U.N. Emergency Force, however, was not used for that purpose, and its validity seems to be based on the premise that the right to establish such a smaller force is implicit in the right to establish a large fighting force. While this conclusion does not necessarily follow from the above premise, other arguments could be made in favor of the Assembly's right to establish this Force.

The Secretary General seems to have proceeded on the assumption that the U.N. Emergency Force is a "subsidiary organ of the General Assembly" and it has been "established in accordance with Article 22 of the Charter."¹⁹ This reliance on Article 22 is perhaps not entirely justified, as it could be argued quite persuasively that the subsidiary organs envisaged by this article should be limited to "committees" or "commissions" assisting the Assembly in the performance of its deliberative, quasi-legislative and investigatory functions. Once, however, it has been accepted that mediators or commissions, appointed by the Assembly to supervise a truce agreement or the observance of the resolutions of the Assembly, might need additional personnel for the exercise of their functions, there seems to be no logical limit to the number of persons needed. Similarly, if military personnel are added to United Nations missions and guards are sent to defend the personnel and the property of such missions, it is difficult to draw the line between permitted and prohibited types of personnel and

¹⁷ No clear reference is contained in any resolution on the subject, and the Secretary General, in his final report of Nov. 6, 1956, refers only to the fact that the Force would be functioning "on the basis of a decision to be reached under the terms of the Resolution 337 (V) 'Uniting for Peace,'" without specifying the relevant section of the resolution. U.N. Doc. A/3302, par. 9.

¹⁸ See Res. 377 A (V) (*loc. cit.* note 12 *supra*), par. 1.

¹⁹ Introduction to the "Regulations for the United Nations Emergency Force" of Feb. 20, 1957, U.N. Doc. A/3552; Agreement between the United Nations and Egypt of Feb. 8, 1957, U.N. Doc. A/3525, pp. 2, 7.

of weapons which may be used by them. It is not surprising, therefore, that various documents relating to the U.N. Emergency Force grant to the officers of the Command of that Force privileges and immunities of Article VI of the Convention on the Privileges and Immunities of the United Nations²⁰ which deals with "experts on missions for the United Nations."²¹

It is also possible to establish a U.N. Force as part of the Secretariat of the United Nations. The Charter does not establish any limitations with respect to the size of the Secretariat; it does not prohibit the recruitment of persons with military training; nor does it prohibit arming them with small or large weapons. The phrase, "such staff as the Organization may require," in Article 97 of the Charter is broad enough to include any military personnel deemed by the Assembly to be required for the purpose of maintaining peace. The Secretary General has stated on several occasions that there is no doubt about his power to establish military units in the Secretariat, even "several thousand strong," provided that budgetary approval is voted by the General Assembly.²²

This method of establishing the U.N. Force cannot be easily applied to a Force composed of national contingents. On the other hand, it is admirably suited to recruitment of volunteers for such a Force. If the General Assembly were willing to make the necessary financial appropriations, the Secretary General could recruit as many individuals as the Assembly should authorize, provide for their training as military units of the Secretariat, and send them on such missions as the Assembly might direct. It may be useful to point out that Article 17 of the Charter contains no limit on the amount of United Nations expenses to be borne by the Members, and by a two-thirds majority the Assembly could adopt a budget containing an appropriation for the maintenance of a Force of 5,000, 20,000, or even 50,000 men. It may be doubted whether the International Court of Justice, if asked for an advisory opinion, would consider such an appropriation as an abuse of the budgetary authority conferred by Article 17.

II. POWER OF THE UNITED NATIONS TO CONTROL A FORCE

The United Nations' power to control a Force established by it seems to be beyond doubt. In particular, the organ of the United Nations establishing the Force, *i.e.*, the Security Council or the General Assembly, may either itself issue the regulations governing the Force or delegate the power to issue such regulations to another organ. For instance, the General Assembly authorized the Secretary General "to issue all regula-

²⁰ General Assembly, 1st Sess., Official Records, First Pt., Resolutions, p. 25 (Doc. A/64); 43 A.J.I.L. Supp. 1 (1949).

²¹ See Regulations (*loc. cit.* note 19 *supra*), par. 19 (a); Agreement (*loc. cit.* note 19 *supra*) pp. 8-9.

²² See, for instance, the Report of the Secretary General on the United Nations Guard of Sept. 18, 1948. U.N. Doc. A/656, pars. 10-11, and Appendix A (Legal Basis of the Guard).

tions and instructions which may be essential to the effective functioning" of the U.N. Emergency Force and "to take all other necessary administrative and executive action."²³ At the same time, the General Assembly established an Advisory Committee composed of representatives of seven countries "to assist the Secretary General in responsibilities falling to him" under the relevant resolutions; and the Secretary General was requested to consult the Committee prior to issuing regulations or instructions to the Force.²⁴ If there arose an important and urgent disagreement on the subject between the Secretary General and the Committee, it would have to be solved by the Assembly itself, and the Assembly empowered the Committee "to request, through the usual procedures, the convening of the General Assembly" whenever the Committee should consider this necessary.²⁵

Similarly, in establishing any future Force, the Assembly might delegate the power to issue regulations for the Force to the Secretary General, acting in consultation with, or subject to approval by, a special watchdog committee. All such regulations would have to comply, of course, with any basic provisions enacted by the General Assembly itself, which would always constitute "the fundamental law" of the Force.²⁶

While the Secretary General was responsible for "all administrative, executive and financial matters" affecting the U.N. Emergency Force, the Chief of the U.N. Command, appointed directly by the General Assembly, was given "full command authority over the Force." He was, therefore, responsible for the "operation" of the Force, for its "deployment" and for the "assignment of troops placed at the disposal of the Force."²⁷ Similar arrangements might be made for any future U.N. Force.

III. RELATIONS BETWEEN THE U.N. FORCE AND THE CONTRIBUTING STATES

If the future U.N. Force should be composed of national contingents, questions might arise as to the amount of control which would be retained by each contributing Member over the troops contributed by it. A distinction must be made here between a permanent assignment of a contingent to the United Nations and an assignment limited to a particular emergency.

In the first case, a Member which has concluded an agreement or made a declaration putting a contingent at the disposal of the United Nations would lose the right to withdraw its contingent without the permission of the United Nations, except under the circumstances clearly specified in such an agreement or declaration. It is understood, however, that a Member could substitute from time to time new troops for old ones, unless

²³ Res. 1001 of Nov. 7, 1956, General Assembly, 1st Emergency Spec. Sess., Official Records, Supp. No. 1, p. 3 (Doc. A/3354).

²⁴ *Ibid.*, pars. 6-8.

²⁵ *Ibid.*, par. 9.

²⁶ Statement by the Secretary General, Nov. 7, 1956. General Assembly, 1st Emergency Spec. Sess., Official Records, Plenary Meetings, p. 119.

²⁷ Regulations for the U.N. Emergency Force of Feb. 20, 1957, U.N. Doc. ST/SG/UNEF/1, pars. 11, 15, 16.

they should then be in action and the Chief of the U.N. Command should find such a substitution inconsistent with the military exigencies of the situation.

In the second case, the assignment would be limited to the period of emergency and the national contingents would have to be released from United Nations service as soon as possible after the end of the emergency. The basic issue here would be who would be entitled to determine authoritatively whether the emergency has ended. Unless a Member has expressly reserved to itself the right to make such a determination, it would seem consistent with the spirit of Article 39 of the Charter and of the Uniting for Peace Resolution to leave to the Security Council and the General Assembly, respectively, the determination not only that a breach of the peace has occurred, but also that it has ended.

As no state is bound, without a special agreement, to contribute a contingent for a U.N. Force, it can accompany its offer of a contribution with such reservations as to the use of its contingent as it may deem necessary; *e.g.*, it may make reservations with respect to the length of service of its troops, the tasks for which the contingent may be used, the need for consent of the state to the territory of which the contingent may be sent, etc. If the competent organ of the United Nations should find any such reservations incompatible with the task to be performed by the Force, and if the state should not be willing to abandon the reservation with respect to which objections have been raised, the United Nations would have a choice of either refusing to accept the particular offer or accepting it on the terms dictated by the contributing state.

The only way out of this difficulty would seem to be for the General Assembly to adopt in advance general regulations specifying the minimum conditions under which troops would be accepted, and for a sufficient number of states to accept these conditions without any reservations. If that should happen, other states would be less likely to try to impose new conditions upon the United Nations and would feel obliged to follow the pattern set by the original acceptances. In such a situation, the United Nations would be less inclined to accept too limited offers and the general standard would remain high.

If the proposed U.N. Force is to be composed of directly recruited volunteers, there should be less difficulty with a state whose nationals have volunteered for the Force. An advance consent for such recruitment would be necessary only where the recruitment campaign is to be conducted on the territory of the state concerned. No such consent would be required for the recruitment of its nationals residing abroad, as long as the state of residence does not raise any objections. A state may prohibit its nationals' entry into the Force, may refuse to give them exit visas, and may punish them for joining the Force. If such punishment should involve the loss of citizenship, the state would, however, lose further control over them to the extent that such control is based on their citizenship.

While a Member's duty in good faith to assist the United Nations in any action taken by it to fulfill the purposes of the Charter might not go so far

as to oblige it to contribute a national contingent to the U.N. Force, it could be argued that a Member has at least the duty to refrain from putting obstacles in the way of its nationals or residents who wish to join the U.N. Force. Any such action violating this duty could be declared by the General Assembly as inconsistent with the Charter. Any such pronouncement would be merely declaratory of existing obligations rather than an attempt to create new obligations, would thus bind all the Members, and the Member which has enacted restrictions on enlistment in the U.N. Force would be required to abolish them.²⁸

IV. THE RELATION BETWEEN THE U.N. FORCE AND THE "HOST" STATE

The establishment of a U.N. Force by the General Assembly is, of course, not subject to veto by any state, but such a Force could not be established if more than one third of the Member States present and voting should decide to oppose it. Both a resolution establishing the Force and a resolution for its financing require a two-thirds majority.²⁹

The General Assembly has also complete authority to determine the organization and composition of the Force. When it comes, however, to the deployment of the Force, it has been argued that the consent of the state in the territory of which the Force is to be deployed, *i.e.*, of the "host" state, is required. Thus the Secretary General has stated that the U.N. Emergency Force cannot "be stationed or operate on the territory of a given country without the consent of that country." On the other hand, he did not exclude "the possibility that the Security Council could use such a Force within the wider margins provided under Chapter VII of the United Nations Charter."³⁰

As explained in Section I above, there seems to be an agreement on the binding character of decisions of the Security Council under Chapter VII of the Charter, and no consent would be necessary if the Security Council should order a Force established by the Council itself or by the General Assembly to enter the territory of a particular state in order to maintain or restore peace.

It has also been suggested that a decision of the Council that an investi-

²⁸ In his report of Feb. 11, 1957, the Secretary General made the distinction "between recommendations which implement a Charter principle, which in itself is binding on Member States, and recommendations which, although adopted under the Charter, do not implement any such basic provision. A recommendation of the first kind would have behind it the force of the Charter, to which collective measures recommended by the General Assembly could add emphasis, without, however, changing the legal character of the recommendation. A decision on collective measures referring to a recommendation of the second kind, although likewise formally retaining its legal character, would mean that the recommendation is recognized by the General Assembly as being of such significance to the efforts of the United Nations as to assimilate it to a recommendation expressing an obligation established by the Charter." U.N. Doc. A/3527, par. 20.

²⁹ U.N. Charter, Art. 18, par. 2.

³⁰ Second Report of the Secretary General on the Plan for the U.N. Emergency Force, Nov. 6, 1956, U.N. Doc. A/3302, par. 9. See also his statement as to the stationing of troops on the Egyptian-Israeli armistice line, of Jan. 24, 1957, U.N. Doc. A/3512, pars. 5 (b), 20.

gating committee be sent to a territory under Article 34 of the Charter, in order to determine whether the continuance of a dispute or a situation is likely to endanger peace, does not require the consent of the state concerned.³¹ Once it is accepted that the decisions of the Security Council under Chapter VI may be binding in certain circumstances, it could be argued that the General Assembly, which has the same powers as the Council under Chapter VI, could also make such binding decisions. Such an interpretation seems to go too far, however, and in any case, it would be difficult to extend this interpretation from the sending of an ordinary subsidiary organ to the sending of a large, or even small, U.N. Force to a territory of a state without its consent.

Another line of approach may be more fruitful. The consent of a state need not be explicit, and often it may be implied. If the General Assembly should by an almost unanimous vote approve a general principle that the new U.N. Force should be entitled to enter the territory of any state whenever the Assembly authorizes it to do so, all states would be presumed to have accepted this principle unless they should expressly state either at the time of the vote in the Assembly or soon thereafter that they do not accept the principle. There is no doubt that the Assembly could be authorized by a general agreement to follow the practice of some specialized agencies and could adopt rules which would become binding without ratification, provided each state be given a chance to reject the new rule within a specified period of time.³² If only a few states should exercise such an option, the rule would become immediately binding on all other states and in due course might even become a customary rule of international law which no state would be allowed to ignore.

Distinction must be made, therefore, between a general rule applicable to unknown future contingencies and an attempt to create a new rule applicable immediately to a given situation. While, in the first case, consent may be implied in certain circumstances, in the second case, consent of the state concerned would have to be given more explicitly; and if consent should not be given, the Force would not be entitled to enter the territory of that state.

The question has also arisen whether a state can withdraw its consent after a U.N. Force has, with the consent of that state, entered its territory. On the one hand, it has been argued that the U.N. Emergency Force must leave the territory of the "host" state whenever that state should so request;³³ on the other hand, as the original Egyptian acceptance contained no reservation on the subject, it could be argued that an international agreement on the entry of the Force into Egypt having been validly con-

³¹ See, for instance, the statements by the U. S. representative (Mr. Johnson) in the Greek Case in July, 1947, Security Council, Official Records, 2nd Year, Nos. 61, 63 and 64, pp. 1423, 1523, 1540-1541. But the proposed U. S. resolution was vetoed by the Soviet Union.

³² Cf. Arts. 12, 37, 38, 54 (1) and (m) 57, 90 of the Convention on International Civil Aviation of Dec. 7, 1944, 15 U.N. Treaty Series 295; and Arts. 21-22 of the Constitution of the World Health Organization of July 22, 1946, 14 *ibid.* 185.

³³ See the statement by the Foreign Minister of Egypt of Nov. 27, 1956, General Assembly, 11th Sess., Official Records, Plenary Meetings, p. 348.

cluded, that agreement cannot be terminated by unilateral declaration of Egypt. In the reverse situation, if the General Assembly should wish to withdraw the Force and if Egypt should object thereto, the United Nations would have to fulfill its part of the bargain. The withdrawal would be permitted only after the emergency envisaged in the original decision to send the Force to the territory of a particular state has actually ceased, and the "host" state could request such withdrawal only if the Force has fulfilled the function for which it was sent to the territory of that state. Whether the emergency envisaged in the agreement or decision which formed the basis for the Force's entry into the territory of the "host" state has ceased is a question of both fact and law, and, if need be, a decision or an advisory opinion of the International Court of Justice might be obtained on the subject.

In cases in which the consent of the "host" state is required, such consent might be conditional, and though it has been argued that the "host" state should not be allowed to dictate to the United Nations what should be the composition of the Force, in practice it may refuse its consent unless it is guaranteed that the Force will be composed of contingents or nationals of certain states, or that contingents or nationals of some states will be excluded from the Force. Of course, where consent had been given in advance by acceptance of general regulations adopted by the General Assembly, such consent could not later be made conditional on the inclusion in or exclusion from the Force of the nationals of any state or states.

Once a U.N. Force had been admitted to the territory of a state, various privileges and immunities would be necessary in order to safeguard its independence. Article 105 of the Charter guarantees to the United Nations "such privileges and immunities as are necessary for the fulfillment of its purposes"; similarly it guarantees to United Nations officials "such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization." These provisions are broad enough to cover a U.N. Force and its members, but it might be useful to spell out in advance what special privileges and immunities are necessary for the "independent exercise of their functions." The provisions of the Convention on the Privileges and Immunities of the United Nations,³⁴ of the Agreement with Egypt on the Status of the U.N. Emergency Force,³⁵ and of the Agreement on the Status of NATO Forces³⁶ may serve as useful guides for a general resolution of the General Assembly on that subject.³⁷ Paragraph 3 of Article 105 of the Charter expressly empowers the General Assembly to make such recommendations as may be necessary to determine the details of the application of that article.

³⁴ See note 20 above.

³⁵ See note 19 above.

³⁶ T.I.A.S., No. 2846; 48 A.J.I.L. Supp. 83 (1954).

³⁷ If the U.N. Force should be composed of volunteers rather than of national contingents, it might be necessary to combine in the hands of the U.N. Command the powers which are divided in the Egyptian agreement between the Command and the states which have contributed contingents to the U.N. Emergency Force. In addition, it would be necessary to establish more detailed military regulations for the Force and appropriate procedures and tribunals for the trial of violators.

THE INITIATION OF COERCION: A MULTI-TEMPORAL ANALYSIS

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The confusion¹ engendered by lack of clarity in fundamental conceptions such as "war," "peace," and "law" begins with, and is perhaps most clearly exhibited in, the traditional discussion of the many and disparate problems frequently subsumed under headings like "The Initiation of War," "The Commencement of War," "The Legal Meaning of War" and "State and Effects of War," or under the simple query "When does war exist (or begin)?" The orthodox debates here have been concerned mainly with determination of the beginning in time of a "legal state of war." They have usually centered on the necessity and the relative technical effect of a somewhat mystical *animus belligerendi*, manifested either in the shape of a formal declaration of war or some other modality, and of physical acts of coercion for the creation of such "state of war." The confusion in these debates arises from a shifting reference to and emphasis on the subjective *animus* of participants and the realities of their coercive practices, as well as to certain assumed consequences of such *animus* or practices, without relating either the *animus* or the practices to the larger context of any particular instance of international coercion and to the major community policies sought by authoritative decision-makers with respect to various specific problems in such context.

Some publicists, for instance, have rigorously insisted that *animus belligerendi* on the part of either the initiating or responding state is the prime requisite which must be unequivocally revealed and without which

^o The views expressed here are not to be imputed to the Government of the Philippines.

¹ This brief essay, essentially a note on a suggested methodology, is written as the second in a series of essays on the legal regulation of international coercion. The first essay, on the processes of coercion and of decision, will appear in the May, 1958, issue of the Yale Law Journal. Others will follow, dealing at length with the major types of problems, from the resort to coercion, through the management of combat and non-combat situations, to the termination of coercion. The documentation of this essay reflects its position in the series.

The perspectives with which we begin are indicated somewhat cryptically in the editorial "Peace and War: Factual Continuum With Multiple Legal Consequences," 49 A.J.L.L. 63 (1955).

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not "war," or a "state of war," but only "reprisals," or "intervention," or some other "measure short of war" may be regarded as having been initiated. The formulation of this view achieved by Lord McNair about three decades ago is now classical:

. . . A state of war arises in International Law (a) at the moment, if any, specified in a declaration of war; or (b) if none is specified, then immediately upon the communication of a declaration of war; or (c) upon the commission of an act of force, under the authority of a State, which is done *animo belligerendi*, or which, being done *sine animo belligerendi* but by way of reprisals or intervention, the other State elects to regard as creating a state of war, either by repelling force by force or in some other way; retroactive effect being given to this election, so that the state of war arises on the commission of the first act of force.²

Other writers, in clear contrast, have de-emphasized the subjectivities of the participants and regard the commencement of "material war" as simultaneously inducing a "legal status of war." Among the more recent expressions of this position is Professor Kelsen's:

Y . . . A state of war in the true and full sense of the term is brought about only by acts of war, that is to say, by the use of armed force; and only such a state may be, but need not necessarily be, terminated by a peace treaty. Consequently war is a specific action, not a status. From the point of view of international law, the most important fact is the resort to war, and that means resort to an action, not resort to a status. Some writers consider the intention to make war, the *animus belligerendi*, of the state or states involved in war as essential. *Animus*

² "The Legal Meaning of War and the Relation of War to Reprisals," 11 *Grotius Society Transactions* 29 at 45 (1925). Among those who have shared this view is Quincy Wright, who wrote: "War begins when any state of the world manifests its intention to make war by some overt act, which may take the form of an act of war, a declaration of war or some ultimatum with a time limit—the existence of war is not dependent upon the type of operations undertaken by the belligerents." ("Changes in the Concept of War," 18 *A.J.I.L.* 755 at 758-759 (1924). Later, Professor Wright submitted that where both belligerents disclaim an intention to make "war," "a state of war does not exist until such time as third states recognize that it does." ("When Does War Exist?" 26 *ibid.* 362 at 366 (1932).) How the intention of a third state is relevant in inter-belligerent relations is not explained.

In his Report on the Legal Position Arising from the Enforcement in Time of Peace of the Measures of Economic Pressure Indicated in Article 16 of the Covenant, Particularly by a Maritime Blockade (8 *League of Nations Official Journal* 834 (1927)), the Secretary General of the League said: . . . "from the legal point of view, the existence of a state of war between two states depends upon their intention and not upon the nature of their acts. Accordingly, measures of coercion, however drastic, which are not intended to create and are not regarded by the State to which they are applied as creating a state of war, do not legally establish a relation of war between the State concerned."

Similar statements may be found in Lawrence, *The Principles of International Law* 309 (7th ed., Winfield, 1928); 2 Westlake, *International Law* 1-2 (1907); Castrén, *The Present Law of War and Neutrality* 31-34 (1954); 2 Møller, *International Law in Peace and War* 156 (trans. Pratt, 1935).

Professor Eagleton, too, seems to have shared this view: see "Acts of War," 35 *A.J.I.L.* 321 (1941). Cf. Starke, *An Introduction to International Law* 363 (3rd ed., 1954).

belligerendi means the intention to wage war. But this can only be the intention to perform acts of war, that is to say, to use armed force, with all the consequences international law attaches to the use of armed force.³

Still others have attempted, in interpreting the pattern of commitment under the Covenant of the League of Nations, to combine both these "subjective" and "objective" theories of "war" and assert that, while ordinarily *animus belligerendi* must be present for a "state of war" to commence,

... if acts of force are sufficiently serious and long continued, then even if both sides disclaim any *animus belligerendi* and refuse to admit that a state of war has arisen between them, there comes a point at which the law must say to the parties, you are refusing to recognize the facts; your actions are of a kind which it is the policy of the law to characterize as war; and therefore, whatever you choose to say about it, you have in fact set up a state of things which in the eye of the law is a state of war.⁴

It should be observed that these formulations, like the comparable definitions of "war" which abound in the literature, make implicit, ambiguous and indiscriminate references to both the "facts" and certain asserted "legal consequences" of facts—to both the precipitating events, of resort to, and exercise of, international coercion and the responses of authoritative decision-makers; in short, to both the process of 'actual' coercion and the process of legal authority. Premised as they are on the ancient dichotomous categorization of "war" and "peace," there is apparent in these formulations no recognition that the initiation of coercion generates, not one unitary problem of ascertaining a precise moment in time for the beginning of a singularly elusive and all-sufficing "legal state

(Principles of International Law 27 (1952)). The protagonists of this side of the debate include Risley, *The Law of War* 81-82 (1897); Baty, "Abuse of Terms: 'Recognition' and 'War,'" 30 A.J.I.L. 377 at 398 (1936); Ronan, "English and American Court and the Definition of War," 31 A.J.I.L. 642 at 656 (1937); Green, "The Nature of the 'War' in Korea," 4 Int. Law Q. 462 at 468 (1951); Pyc, "The Legal Status of the Korean Hostilities," 45 Georgetown Law J. 45 at 48-51 (1956). Cf. Hall, *International Law* 444-445 (8th ed., Pearce Higgins, 1924).

Proponents Borchard and Stowell appeared to have favored this side: see Borchard, "War and Peace," 27 A.J.I.L. 114 (1933), and "When Did War Begin?" 47 Columbia Law Rev. 742 (1947); and Stowell, *International Law* 491 (1931).

Proponents Hyde expressed the same view as Lord McNair (3 *International Law* 693 [rev. ed., 1945]), but proposed at the same time that "the character of the acts committed rather than the design of the actors should, and probably should be regarded as decisive of the legal result." (*Ibid.* 1688).

Brierly, "International Law and Resort to Armed Force," 4 *Cambridge Law J.* 308 at 313 (1932). Cf. Lauterpacht, "Resort to War and the Interpretation of the Covenant During the Manchurian Dispute," 28 A.J.I.L. 43 (1934), who does not accept the "intention" theory of "war," but at the same time suggests that "war" is not necessarily synonymous with the use of "armed force." These "subjective" and "objective" theories are summarized and discussed in Hagège, "The Attempt to Define War," *International Conciliation*, No. 291, p. 258 (1933), and in Williams, *Some Aspects of the Covenant of the League of Nations* 101-102 (1934).

of war,"⁵ but rather a whole series of complex problems. The problems created in any particular instance of coercion, as will appear below, call for the resolution of very different types of conflicting claims asserted by various parties upon the initial stages of the process of coercion, and raise greatly differing issues of legal policy for the different officials who must reach a decision.

Increasing dissatisfaction with the traditional answers to the traditional question is in modest measure displayed in the recent literature of international law. A number of scholars have sought, with varying degrees of success, to bring significant clarification into the use of basic terms. Dr. Grob, for instance, rejects with deserved ridicule the absolutistic notion of "war in the legal sense" and of a "legal state of war." He contends that what must be looked for is not "one over-all legal definition of war" but rather a "variety of legal definitions."⁶ Each "legal definition" he would formulate in relation to, and after ascertainment of, "the particular intent and purpose" of the specific "rule of law on war" which happens to be under consideration at a given time. The question whether any particular exercise of coercion "constitutes" "war" or not must, in his view, to be meaningful, specify a particular rule of law in relation to which the "existence of war" may be affirmed or denied.⁷ In his analysis, to affirm or deny that a set of events marks the beginning or existence of "war" is to assert that the specified rule of law is or is not applicable to such events. The same exercise of coercion, which may "legally constitute" "war" in relation to one rule of law on war, obviously need not at the same stage "constitute" "war" in the sense of another rule; hence the relativity of which he speaks.⁸ The applicability or non-applicability of a given rule to given facts, Dr. Grob explains, "depends upon its (the rule's) intent and purposes. It is the business of interpretation to furnish that answer. It cannot be gleaned from anywhere else."⁹ Thus, for Dr. Grob, the basic task is reduced to the "interpretation" of legal technicality.

Professor Stone exhibits considerably more restraint and diffidence in his efforts at clarification. He still speaks of a "necessity," in view

⁵ Professor Wright stated the traditional point succinctly: "the incidence of an act or declaration converting the state of peace into a state of war establishes a division in time before which acts of war are illegal and after which they are legal between belligerents . . ." ("Changes in the Concept of War," 18 A.J.I.L. 755 at 757 (1924)). Hence, traditionally, juristic effort has been directed towards determining what acts or declarations convert "the state of peace" into a "state of war." And see Déak, "Computation of Time in International Law," 20 A.J.I.L. 502 at 506-508, 514 (1926) for a plea, made with great seriousness, that the exact date, hour and minute for the beginning of a "state of war" be specified for the reason that "this changes profoundly the juridical situation of each country" (at 506).

⁶ The Relativity of War and Peace 189 (1949).

⁷ *Ibid.* 202.

⁸ *Ibid.* 303: "Operations, as they progress . . . begin to be war legally at diverse points of time. The question 'when does war legally begin?' thus requires not one but several answers." See also *ibid.* 192, 194, 221-224, 318.

⁹ *Ibid.* 204.

of the "wide ranging legal effects of war," of determining "*the moment of its legal commencement.*" The problem, to him, is "plain enough." "War commences," Professor Stone writes, "when facts come into existence which satisfy the (above) definition of war."¹⁰ Since his definition of war is no more revolutionary than a rephrasing of the "intention" or "subjective theory" of "war," he adheres closely to Lord McNair's formulation quoted earlier. That he does not escape the ambiguity resulting from a dual and simultaneous reference to "facts" and "legal consequences" is perhaps most clearly shown in his casual remark that war begins with the earliest *operative event*.¹¹ Professor Stone, however, departs from the wholly conventional treatment of the initiation of coercion in two respects. First, he recognizes that "the moment of commencement of war" "on the international level" need not necessarily coincide with the beginning of war for differing "municipal legal purposes."¹² Secondly, in the course of discussing the "legal consequences of *undeclared* hostilities," he suggests that clarity in the question of "war or no war" may be approached by recognizing that varying answers may be given as "the purposes for which an answer is sought" vary.¹³ He refers, as Dr. Grob did, to the purpose of individual rules or sets of rules, of war law, and of individual provisions of such instruments as the Pact of Paris and the Charter of the United Nations. Unlike Dr. Grob,¹⁴ however, he confines his suggestions to situations where the contending participants not only fail to issue formal declarations of war but also disclaim an intent to engage in war and describe their coercive operations by some other words.¹⁵ The assumption of Professor Stone seems to be that the relativity of "war or no war" is precluded by a declaration of intent by either belligerent and that as soon as such a declaration is made there can be but one unvarying answer, whatever "the purposes for which an answer is sought" may be.

While recognizing that some measure of clarification has been achieved

¹⁰ Legal Controls of International Conflict 310 (1954). His definition of war is "a declaration of one or more governments to at least one other government, in which at least one of such governments no longer permits its relations with the other or others to be governed by the laws of peace." (p. 304.)

¹¹ *Ibid.*, 310, note 75.

¹² *Ibid.*, 310-311, 311, note 78. He gives some indication of what he means by "municipal legal purposes": "It has become . . . a matter of legislative prudence to fix explicitly the beginning and end of war for the purpose at hand in each major field of legislative endeavor. They may, for example, be fixed at one point in relation to wartime emergency powers, in another for regulation of private legal relations, and this even though the legislature may seem to have left the matter open." (p. 311.) Cf. Corbett, *Law and Society in the Relations of States* 212-213 (1951); and Grob, "Armed Conflict, War, and Self-Defence," 6 *Archiv des Völkerrechts* 387, 424, 428 (1957).

¹³ Stone, *op. cit.* 312. Professor Stone almost deprecates his own contribution, insisting that its value is "rather *de lege ferenda* than as a description of existing law,"¹³ and describing his observations as "most tentative" and "by no means coherent with each other." (p. 313.)

¹⁴ See Grob, *op. cit.* 283-302.

¹⁵ Stone, *op. cit.* 312.

by both scholars, a measure which was anticipated by Judge Hudson,¹⁶ it may be observed that both appear unduly preoccupied with the technical rules on which they have focused rather than on particular problems, particular policies and particular decision-makers. The task of clarification, as will be indicated below, involves deeper difficulties than either Dr. Grob or Professor Stone recognizes. It calls, contrary to the suggestion of the former, for much more than ascertaining the "legal meaning" of words used in particular formulations of prescriptions or the "exact intent and purpose" of the formulators.¹⁷ It demands, notwithstanding the suggestion of the latter, that an inquirer go behind pronouncements of intent to the factual and policy problems which are just as varied and complex when such rituals are performed as when they are foregone. Both scholars exhibit little awareness of the number and complexity of the variables in the interrelated but distinguishable processes of coercion and of decision.¹⁸ They do not emphasize, in particular, that the application or non-application of a particular rule to a particular situation of fact, if inquiry is to go beyond abstract and normatively ambiguous statements,¹⁹ must be viewed as the product of a decisional process, and that such product can scarcely be meaningfully studied unless the decision-maker (the applier) is identified, his policy objectives clearly articulated, and the various conditions and the procedures of application specified.²⁰ Both scholars stop short of the effort to arrive at a comprehensive guiding theory for inquiry into the problems, policies and prescriptions relating to the initiation of coercion and violence. The several intellectual tasks indispensable to the achievement of deeper insight into the processes of coercion and decision and of

¹⁶ See his "The Duration of the War Between the United States and Germany," 39 *Harvard Law Rev.* 1020 at 1020-1021 (1926).

¹⁷ Dr. Grob conceives the basic task to be that of ascertaining the "legal reality," "the truth" and "legal meaning" of the "two central, all important terms 'war' and 'peace'" (p. 36), of determining "what the rules of law on war mean" (p. 188). His demand for "legal answers" leads him to say that "Arguing with facts alone will not do. Mere facts prove nothing" (p. 201; italics in the original). The conceptualism of his study thus does not extend to the clear relation of the facts of coercion and the process of decision.

¹⁸ Some preliminary indication of what we mean by the process of coercion and the process of decision may be obtained from McDougal, "Peace and War: Factual Continuum With Multiple Legal Consequences," 49 *A.J.I.L.* 63 (1955). See also *id.*, "El Derecho Internacional como Ciencia Política," 3 *Revista de Derecho y Ciencias Sociales* Nos. 3-4, p. 142 (1957, Buenos Aires).

¹⁹ For exposition of what is characterized as normative-ambiguity, see Lasswell and McDougal, "Legal Education and Public Policy: Professional Training in the Public Interest," 52 *Yale Law J.* 203, 266-267 (1943).

²⁰ Amplification of this general point is offered in McDougal, "Law As a Process of Decision: A Policy-Oriented Approach To Legal Study," 1 *Natural Law Forum* 53, 54-58, 64-68 (1956); and *id.*, "The Comparative Study of Law For Value Purposes: Value Clarification As An Instrument of Democratic World Order," 61 *Yale Law J.* 915 (1952), 1 *A.J. Comp. Law* 24 (1952). See also Lasswell, "Current Studies of the Decision Process: Automation versus Creativity," 8 *Western Pol. Q.* 381 (1955); and Lerner and Lasswell (eds.), *The Policy Sciences* (1951). For an introduction to the theory of decision-making, see Bross, *Design For Decision* (1953).

closer approximation to community and preferred goals remain unperformed.²¹

Preoccupation with legal technicality is even more intense in Dr. Kotzsch's recent study.²² Dr. Kotzsch, addressing himself, as Professor Stone did, to the problem of "war without a declaration of war," works out at labored length a distinction between "war in the material sense" and "war in the formal sense." "Formal war," in his sense, is no more than the "legal state of war" as conceived in all its rigor in traditional theory, while "material war" includes all factual situations of military conflict of some duration and extent (as distinguished from isolated acts of violence) where, through disclaimer or lack of a showing of *animus belligerendi*, no "legal state of war" is regarded as established. The main difference to which he points is in terms of "legal consequences" and lies in the extent of application of the law of war: "formal war" automatically brings about the full operation of all the rules of war and neutrality; "material war," on the other hand, as "institutionalized in the province of international law," initiates only a "selective" application of those rules.²³ The question "war or no war," he writes, following Dr. Grob, "henceforth must be specified by material or formal if a legal answer is sought."²⁴ In Dr. Kotzsch's scheme, there is not one intermediate status between "peace" and "war." There are instead, he asserts, two dichotomies—"peace" and "formal war," and "peace" and "material war."²⁵ The initiation of international coercion may thus mark the commencement of either "formal war" or of "material war," depending on whether or not there is an announced *animus belligerendi*. "War" having been split,

²¹ A brief itemization of recommended "intellectual tasks" may be found in McDougal, "International Law, Power and Policy: A Contemporary Conception," 82 Hague Academy Recueil des Cours 137, 141 (1953); and in the article cited note 20 *supra*, 1 Natural Law Forum at 58-59. See also Lasswell, *The World Revolution of Our Time—A Framework For Basic Policy Research* (Hoover Institute Studies, 1951).

²² *The Concept of War in Contemporary History and International Law* (1956).

²³ *Ibid.* 52-65, 234-235, 241-244. Dr. Kotzsch differentiates his distinction from that between "war in the legal sense" (war as a "legal condition") and "war in the material sense" (war as actual military operations) adverted to, for instance, by Professor Wright (*op. cit.* note 2 *supra*) in the following terms: "If we, however, replace the distinction of *war in the legal sense* and *war in the material sense* by that of *war in the formal sense* and *war in the material sense*, it is for the following reason: The former distinction implies the idea that *war in the legal sense* is of relevancy under international law whereas *war in the material sense* is not. This is not true. Both forms have obtained their meaning under international law. By customary international law legal consequences have been imputed to *war in the material sense*. . . ." (p. 52.)

²⁴ *Ibid.* 55.

²⁵ *Ibid.* 241-244. Compare Jessup, "Should International Law Recognize an Intermediate Status Between Peace and War?" 48 A.J.I.L. 98 (1954), and "Intermediacy," 23 Nordisk Tidsskrift for International Ret 16 (1953); and Schwarzenberger, "Jus Pacis Ac Belli? Prolegomena to a Sociology of International Law," 37 A.J.I.L. 460 (1943). In McDougal, article cited note 18 *supra*, it was suggested, apropos of the proposals for recognition and elaboration of a new "status intermediate between war and peace," that a mode of analysis more comprehensive and flexible than either dichotomy or trichotomy may be required if clarity and rationality are to be promoted.

so to speak, into the "formal" and "material," he states that it ("war") no longer necessarily implies "the integral application of the sum-total of the laws of war."²⁶ One of his main concerns appears to be to fashion a doctrinal answer to belligerent claims, which have been asserted in the past, to avoid the thrust of the law of war and neutrality by labeling their physical operations with some other name. Dr. Kotzsch's aspirations in his scholarly study are admirable. It would seem open to serious doubt, however, whether its conceptualism, which is at times less than lucid, can offer more than minimal help in clarifying the problems of legal policy attendant upon the initiation of coercion and in increasing the incidence of rational decisions.

The first step, we submit, towards contact with reality is reference to, and careful orientation in, the factual process of coercion across national boundaries. In broad preliminary characterization, this process of coercion may be described in terms of various *participants* applying to each other coercion of alternately accelerating and decelerating degrees of intensity, for a wide range of *objectives*, utilizing *methods* which include the employment of all known distinctive strategies or instruments of policy, under the variable *conditions* of a world arena in continuous flux.²⁷ It may be observed that, in the course of this process of coercion, the participants assert against each other many varying claims respecting the lawfulness and unlawfulness of the particular coercive practices being utilized by or against them, invoking both world prescriptions and world opinion to fortify their respective assertions.

The description we suggest of factual coercion in terms of "process" is intended not merely to convey a sense of the variety in participant, purpose, modality and claim, but also to emphasize the facts of *continuity*—continuity in coercive action and reaction and in assertion and counter-assertion—and of *changing intensities in degree*, from the mildest to the most severe applications of coercion. Between the two extremes of "pure" peace and "total" war, the states of the world arena may in these terms be observed continuously to engage each other for power and other values, by

²⁶ *Op. cit.* note 22 *supra*, at 243. Through his two dichotomies (or trichotomy), he also attempts to resolve the old debate on the "subjective" and "objective" tests of the beginning or existence of war by combining the two: "The concept of *war in the material and formal senses* pays regard to both the purely objective test of war and the subjective test, which is the essence of the status theory of war. It resolves the doctrinal conflict between the objective and subjective theories of war by the assumption that these theories are not mutually exclusive but complementary" (pp. 54-55). The minor point has been suggested above that such observations are apt to be no more than exercises in legal syntactics unless both the perspectives of participants and their physical operations are considered in the larger context of the particular instance of coercion involved. The major point is that Dr. Kotzsch's framework for inquiry seems to us less than completely adequate even for the modest goal he set for himself—"to describe the modern concept of war in general international law" (p. 2; italics supplied).

²⁷ Compare Wright, "International Conflict and the United Nations," 10 *World Politics* 24, 34-44 (1957), who describes the processes of conflict among states in terms of the *parties*, their *relations*, and the *field* in which conflicts occur.

statements of policy, in a *continuum* of degrees in coercive practice, ranging from the least intense to the most intense.²⁸ From this orientation the task of the initiation of coercion is to refer to those stages of the coercive process at which coercion is still at a relatively low degree of intensity but accelerating towards the peak intensity of maximum use of the military instrument for destruction.²⁹

In such initiation stages of the coercion process, participants of all categories—including officials of the contending belligerents, officials of international organizations and of non-belligerents (who are non-participants in the process of coercion but nevertheless assert certain claims); and individual nationals of both the belligerents and non-belligerents begin, as suggested, to make certain claims against each other. An indication of the rich complexity of the structure of such contraposed claims may be had even from impressionistic description.

Thus, in one type of controversy, a belligerent asserts, as against a target state and international officials who are representatives of the world public order, claims to initiate highly coercive or violent means of modifying the existing world public order and the world distribution of power and other values. The assertion of these claims frequently marks the culmination of a longer or shorter period during which an intensifying degree of coercion was exerted by and against the claimant through non-military instruments, or in which the dimensions of military force were kept short of open and substantial destruction. At a certain stage in intensity officials of the target state may respond with claims to employ retaliatory coercion in the name of self-defense. International officials may, for their part, make claims to competence to characterize such coercion and violence as unlawful breaches of the public order of the world community and to take appropriate steps forcibly to redress such breaches.

Similarly, in another type of controversy, the belligerents, including both the attacking and defending states and, where community responsibility is successfully organized, international armed forces, make claims

²⁸ The point is made more or less explicitly in any number of studies on international relations; see, e.g., Haas and Whiting, *Dynamics of International Relations*, Ch. 3 (1947); Morgenthau, *Politics Among Nations*, Chs. 3-6 (2nd ed., 1954); Strouzel and Posen, *International Relations*, Chs. 1-3 (2nd ed., 1954); Schwarzenberger, *Politics*, 17 and Chs. 6-12 (1951); Kalijarvi and Associates, *Modern World Politics*, Ch. 3 (3rd ed., 1953). On the fluctuations and periodicity of the magnitude of coercion and violence over long periods of history, see 3 Sorokin, *Social and Cultural Dynamics* 259-380 (1937).

²⁹ Cf. 2 Wright, *A Study of War* 698 (1942): "... analysis of the military, psychological, legal, and sociological manifestations of war suggests that all these may be regarded as variables which reach a certain threshold of intensity in actual war. War may therefore be regarded from the standpoint of each belligerent as an extreme intensification of military activity, psychological tension, legal power, and social integration—an intensification which is not likely to result unless the enemy is approximately equal in material power." At 689: "... the time space continuum, which in a legal sense is designated a war, has not necessarily been accompanied by a unity or uniformity of intense military activity. While in international legal theory a state of war between two states begins and ends at definite moments of time, these moments have frequently been difficult to establish in practice."

against each other to engage in the different component practices of military violence to secure their respective objectives. This general claim to employ the military instrument may be given operational meaning in terms of the detailed claims of each to apply violence in the capture or destruction of the other's bases of power by employing certain combatants with certain weapons, in certain areas of operations, and against certain objects of attack. The negating claim asserted in turn by each against the other is that the violence exerted is inhuman, unnecessary or disproportionate, or, in more detail, that certain combatants are unauthorized, that certain weapons are unlawful, that certain areas of operations are beyond permissible bounds, and that certain objects may not legitimately be captured or destroyed. Both belligerents may also, before or after the outburst of military violence, claim to cut off, with varying degrees of completeness, diplomatic and consular relations and the commerce, communication and transportation between them, and to terminate or continue observance of previous agreements with each other.

In still another type of controversy, representatives of the world public order claim, mostly after the stage of overt violence has been reached, competence to activate the commitments of third states to participate in organized community measures designed to repress violence characterized as unlawful. Non-belligerents may respond favorably and claim a right to participate, or unfavorably and set up claims to avoid participation, in community sanctions procedures. Where the pattern of community responsibility fails, and the international officials are unable effectively to assert claims of authority, a second set of claims assumes special importance. Belligerents demand from third states non-participation and non-augmentation of the other belligerent's power resources. Third states make countering demands for non-interference with their nationals, resources and normal activities.

In a fourth type of controversy, each belligerent may be observed to begin, at points of varying time before or after the stage of active military hostilities, making claims to exercise more or less comprehensive control over the industry, commerce, labor, communications, transportation, price and consumption levels, private agreements and property, and personal activities of individuals within its own territory. Internal value processes are governmentalized in increasingly high degree, in the effort to organize, maximize, manage and effectively utilize the belligerent's bases of power. Each belligerent further claims authority to define and discriminate between "enemy persons" and non-enemy persons, and to impose more rigid controls on the former's persons and property, both for preventing their utilization by the enemy belligerent and for satisfying its own military needs. The countering claim of "enemy persons" is for respect for their human dignity, loyalties and property.

There is a fifth type of controversy where individuals assert against other individuals, at differing points along the *continuum* of coercion, certain claims and counterclaims, the most conspicuous of which are to require, or refrain from, or terminate, the honoring of certain commit-

ments, and to certain specific interpretations of so-called "war clauses" in documents such as, for instance, insurance policies and charter parties. It is in connection with the latter type of claims that much of the judicial discussion on "When does (or did) war begin?" has taken place.³⁰ It is

³⁰ The "war clause" in life insurance policies is typically a clause excluding or limiting the liability of the insurer in case the insured dies as a result of, or while engaged in, service in the armed forces in "time of war." The wording of the "war clause" has, of course, varied in different policies. The technical issue, however, has usually been presented in the form of whether or not, at the time of the insured's death, there was "war" either between the state of the forum and another state or between foreign states.

The cases which arose in American courts during World War II commonly involved deaths which occurred on Dec. 7, 1941, during the attack by Japanese forces on Pearl Harbor. A group of cases—e.g. *West v. Palmetto State Life Ins. Co.*, 25 S.E. 2d 475 (1943), 262 S.C. 422; *Rosenau v. Idaho Mutual Benefit Assn.*, 145 Pac. 2d 227 (1944), 65 Idaho 408; *Savage v. Sun Life Insurance Co.*, 57 F. Supp. 620 (W.D. La., 1944); *Priog v. Sun Life Assurance Co.*, 37 Hawaii 208 (1945)—allowed recovery by the beneficiary, holding that because the U. S. Congress, to which the Constitution had allocated the power to declare war, had not declared war until Dec. 8, 1941, and had not made its declaration retroactive (as the President had requested) to Dec. 7, there was as yet no "state of war," or "war in the legal" or "constitutional sense," on the latter date. These cases relied on a concept that courts may not take judicial notice of the existence of a war until it is formally and officially declared by the Congress, and distinguished between an "act of war" and a "state of war." In *New York Life Ins. Co. v. Bennion*, 158 F. 2d 260 (C.C.A. 10th, 1946), 41 A.J.L.L. 680 (1947), cert. denied, 331 U. S. 811 (1947), noted in 56 Yale L.J. 746 (1947), however, the court, under an identical set of facts, denied recovery against the insurer, holding that the existence of a state of war was not dependent upon its formal declaration but was determinable from an appraisal of actualities, and that there had been a sufficient political determination (by the President) of the existence of war commencing with the attack on Pearl Harbor. Cf. *Stankus v. New York Life Ins. Co.*, 312 Mass. 366, 44 N.E. 2d 687 (1942), where the insured seaman died when the *USS Reuben James* was torpedoed by German submarines on Oct. 30, 1941; and *Vanderbilt v. Travelers Ins. Co.*, 12 Misc. 248, 184 N.Y.S. 54 (1920), where the insured lost his life when the *Lusitania* was sunk.

A similar set of life insurance cases arose out of deaths which occurred during the United Nations action in Korea. *Beley v. Pennsylvania Mutual Life Ins. Co.*, 373 Pa. 331, 95 A. 2d 202 (1953), and *Harding v. Pennsylvania Mutual Life Ins. Co.*, 171 Pa. Super. 236, 90 A. 2d 389, rehearing denied, 95 A. 2d 221 (1953), held that since war had not been declared by Congress, the conflict in Korea did not constitute a "war" in the "constitutional" or "legal" sense, and permitted recovery against the insurer. Other courts have taken the opposite stand in a long line of cases: e.g. *Stanberry v. Aetna Life Ins. Co.*, 26 N.J. Super. 498, 98 A. 2d 134 (1953); *Langlas v. Iowa Life Ins. Co.*, 145 Iowa 713, 63 N.W. 2d 885 (1954); *Gudewicz v. John Hancock Mutual Life Ins. Co.*, 331 Mass. 752, 122 N.E. 2d 900 (1954); *Christensen v. Sterling Ins. Co.*, 284 Pac. 2d 287 (1955); *Western Reserve Life Ins. Co. v. Meadows*, 152 Tex. 559, 261 S.W. 2d 554 (1953), cert. denied, 347 U. S. 928 (1954); *Lynch v. National Life and Accident Ins. Co.*, 278 S.W. 2d 32 (1955); *Weissman v. Metropolitan Life Ins. Co.*, 112 F. Supp. 420 (D.C.S.D. Cal., 1953); *Gagliormella v. Metropolitan Life Ins. Co.*, 122 F. Supp. 246 (D.C. Mass., 1954); *Carius v. New York Life Ins. Co.*, 124 F. Supp. 358 (D.C.S.D. Ill., 1954); and *Wilkinson v. Equitable Life Assurance Society*, 151 N.Y.S. 2d 1018 (1956).

For cases involving charter parties containing "war risk" clauses, see *Kawasaki Kisen Kaishiki Kaisha v. Bantam Steamship Co. Ltd.*, [1939] 2 K.B. 544, and *Spanish Government v. North of England Steamship Co. Ltd.*, [1938] 54 T.L.R. 852.

perhaps an index of the extent of the common confusion that it is precisely this type of private claims in the resolution of which the world prescriptions and fundamental world community policies relating to coercion are really largely, if not wholly, irrelevant. The basic problem raised by these claims is not that of distinguishing between permissible and non-permissible exercises of coercion, nor that of formulating distinctions between the "legal" and the "non-legal" senses of "war" or "blockade" or comparable terms, as Professor Stone seems to suggest,³¹ but rather that of discerning and giving effect, within the limits of any overriding community policy, to the major purposes and expectations which the private parties to the document in question sought to project.³²

It is not, of course, meant to be suggested that in each and every context in which coercion is initiated, all the participants actually make all

³¹ Stone, *op. cit.* 304, note 40, 310, note 77, 314, note 92.

³² It seems fairly obvious that the question of the commencement or existence of a "state of war," or "war in the legal sense" or simply "war," between two countries as determined for the very different purposes of the world public order is but of tangential, if any, relevance to this problem, which calls essentially for the application of familiar principles of interpretation. The approach adopted in the *Bennion* case (note 30 *supra*), where the court inquired into the expectations of the parties as to what risks would be excluded exemplifies the point we are making. The court said: "The subject matter of the contract was a risk assured on the life of the insured by the Company, for a stipulated premium, and the use of the word war was obviously intended to denote a restriction or limitation upon the risk assumed. It is plain, therefore, that the definition given to the word war bears a direct relationship to the risk assumed. . . . Viewed in this light, it is also plain that when the parties used the word war, they had in mind the hazard to human life incident" (158 F. 2d at 265). Obviously, the hazard to life was not dependent on a situation of military violence being characterized as a "war" or "state of war." This approach was adopted in the cases arising out of the Korean conflict starting from the *Stanberry* case (note 30 *supra*).

In the *Kawasaki Kisen Kaishiki Kaisha* case (note 30 *supra*) the court refused to hold the steamship company liable for damages for canceling the charter-party under a clause authorizing such cancellation by either party "if war breaks out involving Japan." The court held in effect that the contingency provided for by the parties had occurred, despite the fact that neither Japan nor China (in 1937) had issued formal declarations of war and that the two countries maintained diplomatic relations with each other. Again, the risk that the parties sought to provide against did not depend upon the presence or absence of "*animus belligerendi*" in either or both countries. The Master of the *Rolls* said: "I am unable to accept the suggestion that there is any technical meaning of the word 'war' for the purpose of the construction of this clause. . . . It seems to me that to suggest that, within the meaning of this charter party, war had not broken out involving Japan on the relevant date is to attribute to the parties to it a desire to import into their contract some obscure and uncertain technicalities of international law rather than the common sense of businessmen."

In the *Spanish Government* case (note 30 *supra*), Lewis, J., did say that the word "blockade" in a clause to the effect that the vessel would not be bound to proceed to "blockade ports," was used in its "strict legal sense." However, regardless of whether a "strict legal sense" or some other sense was to be imparted to "blockade," the court explicitly found that the risk provided against never materialized, that the announced intention of the Franco Government to blockade certain ports was never carried out, and that there was no greater danger or risk of interference with British vessels after the Nationalist announcement than before.

the above types of claims. In any particular constellation of events, one or more of the participants may, for diverse reasons, refrain from asserting any one or more of the kinds of claims that such participants might otherwise be expected to assert. For instance, organs of international governmental organizations may restrain themselves from, or may postpone characterizing, exercises of coercion by a particular belligerent as non-permissible, or calling for collective enforcement action, because of low estimates of the degree of probable conformity.³³ Again, because of expectations of excessive material and human costs which a military response may occasion, a target nation-state may decline to claim to meet force with force. The bloodless conquest of Czechoslovakia and the military occupation of Denmark by Nazi Germany in 1939 and 1940 are obvious examples of this situation.³⁴ A belligerent of negligible military capabilities and with relative security from military attack may also content itself with controlling enemy persons or taking enemy property within its territory and not claim actively to use the military instrument. Certain Latin American countries which joined the Allied Powers in World War II sequestered private German property without engaging in or contributing to actual military operations against Germany.³⁵

From careful orientation in the processes of coercion and claim, the next step we recommend in the clarification of the ambiguous and confusing reference of the "commencement of war" is an equally careful orientation in the process of legal decision by which community intervention is organized in the attempt to regulate international coercion. This second process may be described, in highest-level abstraction, as was the process of coercion, in terms of certain *established decision-makers* seeking certain common policy *objectives* under the varying *conditions* of the world arena, by certain *methods* or *procedures* of formulating and applying authoritative prescriptions. From such perspective, it must be apparent that the great variety of claims asserted by varying parties at various points in the factual *continuum* of coercion, generate just as great a variety of policy problems, all traditionally lumped together under one simple label. It is to these "facts," claims and problems, that the different decision-makers, who include officials of international govern-

³³ Goodrich and Simons, *The United Nations and the Maintenance of International Peace and Security* 364-365 (1955), point out that this was an important reason for postponing action by the Security Council under Art. 39 of the Charter in the Palestine case, and for the delay in the determination by the General Assembly of the commission of aggression by the Peoples' Republic of China in the Korean case. Cf. on the point made in the text, Wright, "The Prevention of Aggression," 50 A.J.I.L. 514 et 515 (1956); and Lauterpacht, *op. cit.* note 4, *supra*, at 55, 59 (on the Manchurian incident of 1931).

³⁴ On the case of Czechoslovakia, see Survey of International Affairs, 1938, Vol. 3, pp. 247-258 (Royal Institute of International Affairs, 1953); on the occupation of Denmark, see "Hitler's Europe," Survey of International Affairs, 1939-1946, p. 510 et seq. (Royal Institute of International Affairs, 1954).

³⁵ See, Glob, *op. cit.* 293-294, and Kotzsch, *op. cit.* 248-250; see also "The War and the Neutrals," Survey of International Affairs, 1939-1946, pp. 114-136 (Royal Institute of International Affairs, 1956).

mental organizations and judges of international courts and arbitration tribunals, as well as civil and military officials of both belligerents and non-belligerents, respond and attach "legal consequences" in the shape of decisions about the lawfulness or unlawfulness of any particular application or avoidance of coercion. The detailed issues of policy, as might be expected, commonly differ as the specific contexts and controversies differ.

Relying upon the categorizations used in sketching the structure of claims asserted upon the initiation of coercion, and anticipating in briefest outline the results of other inquiries, we may observe authoritative decision-makers to be seeking, in the belligerent *versus* target belligerent and international officials type of controversy, to prevent change through coercive procedures (or procedures involving a high degree of coercion), to promote change through non-coercive procedures (or procedures involving only a minimum degree of coercion) and to maintain a world public order of varying consistency with the values of a free society.³⁶ At the same time, the community seeks to harness coercion to the maintenance of order by authorizing coercion as an individual, group or community response to unauthorized coercion. These complementary policies are sought by invoking and applying, with varying degrees of success, fundamental prescriptions which discriminate between different coercive practices and characterize some as non-permissible and others as permissible.

In the controversies between belligerents about the conduct of hostilities, the authoritative decision-makers bring to bear the familiar, equally complementary, principles of military necessity and humanitarianism. The basic effort is to minimize the unnecessary destruction of values through the application of a law of war sustained by the same principle which sustains

³⁶ We have, for the purpose of economy in expression, spoken of "the" public order of the world community. It is a fact of contemporary international life, however, that there is no single world public order as such, or a single conception thereof. There appear, rather, competing demanded conceptions of world public order and of international law, some of which are compatible with the postulated goal of wide sharing of values while others are not. See, *e.g.*, Stone, *op. cit.* 57-64; Kunz, "Pluralism of Legal and Value Systems and International Law," 49 A.J.I.L. 370 (1955); Wilk, "International Law and Global Ideological Conflict: Reflections on the Universality of International Law," 45 *ibid.* 648 (1951); Schwarzenberger, "The Impact of the East-West Rift on International Law," 36 Grotius Society Transactions 229 (1950); Smith, *The Crisis of the Law of Nations*, Ch. 2 (1947).

On the Soviet conception of international law, see, *e.g.*, Hazard, *Law and Social Change in the U.S.S.R.*, Ch. 11 (1953); *id.*, *The Soviet Union and International Law* 189 *et seq.* (1950); Soloveitchik, "International Law as 'Instrument of Politics,'" 21 U. of Kansas City Law Rev. 169 (1953); Kulski, "The Soviet Interpretation of International Law," 49 A.J.I.L. 518 (1955); Schlesinger, *Soviet Legal Theory*, Ch. 10 (2nd ed., 1951); Taracouzio, *The Soviet Union and International Law* (1935); Kelsen, *The Communist Theory of Law* (1955).

On the Nazi German conception of international law, see Preuss, "National Socialist Conceptions of International Law," 29 Am. Pol. Sci. Rev. 594 (1935); Gott, "The National Socialist Theory of International Law," 32 A.J.I.L. 704 (1938); and Florin and Herz, "Bolshevist and National Socialist Doctrines of International Law," 7 Social Research 1 (1940).

the self-interest of belligerents—the principle of economy in the exercise of coercion and force.

In the confrontation of international officials or belligerents and non-belligerents about participation, two sets of policies, corresponding to the two sets of claims we have noted, are successively sought by the established decision-makers. In the first, the community attempts to secure the maximum possible of common responsibility for repressing coercion authoritatively designated as unlawful by limiting the extent to which non-participation is permissible. The complementary policy of minimizing involvement and localizing the area of violence is urged by those who seek possible advantages in non-participation. In the second set, authoritative decision-makers are seeking, in determining the relative rights and duties of belligerents and non-belligerents, to adjust and balance the contraposed policies of military effectiveness, in terms of the isolation of the enemy belligerent, and of reducing to a minimum the consequent disruptions of the value processes of non-belligerents.

In the fourth type of controversy, *i.e.*, belligerent *vis-à-vis* individuals in the belligerent's own territory, and insofar as the control of "enemy persons" is concerned, the competing policies to be reconciled refer to the security interests of the belligerent and to the human rights of "enemy" individuals. Respecting the control of enemy property, the basic policies discernible in the few vague and disputed limitations interposed by international law have been described in terms of the protection of private property and the encouragement of free worldwide circulation of wealth and of the satisfaction of the security and military needs of the belligerent. Substantially the same policies are at stake, though perhaps in differing degree, in the regulation and utilization by a belligerent of its own nationals and their property. Such policies are here, however, sought to be secured for the most part, if not wholly, through the medium of municipal rather than international prescription; decision-makers external to the state have imposed but few controls. The historic frame of reference for such problems is that which Professor Stone designated as "war" for "municipal legal purposes."

In the fifth type of controversy—individuals against individuals—authoritative decision-makers, in regulating private transactions involving what might be called an "enemy element," seek an equilibrium between protection of the military interests of the belligerent and maintenance of the stability of expectations created by such transactions. Like the preceding context, this is much regulated by municipal law.

With such brief orientation in both the practices of coercion and the responses evoked from the various authoritative decision-makers, it may now be possible to achieve some further clarification of the legal policy problems commonly associated with the initiation, as distinguished from the management and termination, of processes of coercion. We have, assuming the perspective of the non-participant observer, described the process of coercion in terms of accelerating and decelerating degrees of intensity—that is, in terms of stages in a process of constant change. We

have also noted that the participants in this process make different appeals to authority at different stages, to which appeals the established decision-makers of the world public order respond, invoking different sets of policies and supporting prescriptions in granting or denying such appeals. Considering both the differences in the claims presented to the authoritative decision-makers and the differences in the policies and prescriptions which such decision-makers deem relevant to the respective types of problems created by those claims, it would seem reasonably clear to an outside observer that there is no one, unique and unitary "when" question that can be fruitfully asked about the application of authority in processes of coercion. To raise, as earlier text-writers have commonly done, one single, undifferentiated "when does war begin" question is to attempt at once to comprehend and transcend all the varying categories of problems, thus placing an impossible burden on communication. Accordingly, the general "when" question about the rôle of authority in coercion processes must be individualized and asked in respect of each specific type of problem. To put the point more positively, the allegedly unitary question must be dissolved into a number of more specific inquiries of how, in differing specified configurations of interrelated and variable factors, certain decision-makers may be expected to respond to certain characteristic claims as to the lawfulness or unlawfulness of certain exercises or avoidances of coercion. So conceived, a "when" question may be regarded as a semantically equivalent, if cryptic, way of referring to the peculiar constellation of all the elements in a given context which elicits certain responses from decision-makers. In this sense, the conventional question "When does war exist (or begin)?" amounts, in equally conventional language, to the question of "What constitutes war?"

From these perspectives, to speak, for instance, of when coercion is prohibited (or when prescriptions on aggression, or threat to or breach of the peace, and self-defense become applicable) is only to refer to the totality of factors—like the chronological priority of resort to coercion; the type and intensity of the coercion exercised; the proportionality of the target state's coercive response; the objectives of both the initiator and the target states; the type and purpose of the decision demanded; the probability and costs of effective decision and so on—which decision-makers, explicitly or otherwise, take into account in characterizing certain applications of coercion as non-permissible. Similarly, to raise the question when non-participation is permissible (or when the rules on neutrality are applicable) is to pose for consideration the relative relevance for differing decision-makers of such factors as the formal commitments of the members of international security organizations, the procedures available for making operative such commitments, the non-member status of a participant or non-participant, the character and degree of participation demanded, the intensity, spatial location and extent of the violence involved, and the differences in power between the participants and non-participants. In like manner, to ask when certain modalities of combat are proscribed (or when certain rules on the conduct of hostilities are

applicable) is to inquire into the relevant details of the level of destruction sought or secured, which, in varying specific contexts, may include among others: the character and authorization of combatants; the type, range and duration of the damage inflicted; the geographic locale of operations; the nature of the objects of attack and the degree to which they constitute effective enemy power bases; and the *quantum* of control achieved over such bases of enemy power. Again, to seek to determine when certain coercive controls may be taken by a participant over certain persons and resources in non-combat situations (or when rules, international or municipal on the definition and treatment of "enemy" and non-"enemy" persons and property are applicable) is to consider the shifting patterns, as presented to decision-makers, of such elements as expectations of impending violence; the formal allegiance and factual loyalties of individuals; the ownership of property, public or private; the degree of actual control by the enemy; the location, type and possible uses of the property regulated; and the security and military needs of the acting participants. Finally, to inquire into whether regulation of, or interference in, private transactions is permissible (or when certain rules on the effects of war on contracts are applicable) is to assess the impact on decisions of data like the location of the parties in relation to the line of war; the time, *i.e.*, the stage in the coercion process, of the formation of the agreement; the stage of performance of the contract; the effects of performance, in terms of the extent to which enemy resources may thereby be augmented or to which the belligerent's own resources may be diminished; and the timing of benefits.

From the above partial listing, it would appear fairly obvious that authoritative decision-makers, in reaching decision, in fact respond not merely to the time, *i.e.*, the particular stage in the process of coercion, at which the opposing claims to be accommodated are asserted, but also to the whole constellation of significant variables that make up the context of such assertions. The special significance to be accorded to the fact of the stage in the process of coercion is dependent upon the relation of such fact to the other equally important variables; the *datum* of time acquires relevance only within the other co-ordinates, as it were, of particular situations. Hence, as intimated above, "when" questions call for much more than a simple reference to the stage in coercive processes at which certain claims are made. They are appropriately posed, not in terms of the relation of some single factor, such as a declaration of *antiqua bellorum belli* or a cannon shot, to a calendar or clock, but in terms rather

of I am somewhat difficult to follow Professor Stone's position when he says that the 1907 Hague Convention III "lacks any substantial modern function" (*op. cit.* 319, note 66), considering that he follows Lord McNair in assigning the time stated in a formal declaration of war (when made), or the time of its communication, as "the moment of its (war's) legal commencement" (*ibid.* 310).

It is true, however, that the Convention is pointless insofar as the prevention of surprise attacks is concerned; for the period of time between the communication of the declaration or ultimatum and the beginning of hostilities was left undetermined, such that even an infinitesimal space of time would apparently satisfy the requirement of "previous warning." See Hall, *op. cit.* note 3 *supra*, at 451-452. Westlake,

of the relations of the different factors *inter se* and to the policies of world public order regarded as material to the type of problem under consideration.

An authoritative decision-maker, in determining the legal import to be ascribed to any particular constellation of variables on any specific problem, may and does rationally take into account sequence relationships of "beforeness," "afterness" and "simultaneousness" among variables (and this is what we mean by "stage" in a process of coercion). Once such decision-maker has determined to attach certain "legal consequences" (or apply certain prescriptions) rather than others, to the "facts" of coercion alleged before him, he may equally rationally and casually assign a calendar date for the beginning of the ascription of the determined "consequences" (or for the applicability of the prescriptions determined). But the assignment of time he makes is a function of his reaction to all the factors constitutive of the specific context and hence varies from problem to problem. Irrationality comes in when some subsequent decision-maker or commentator seizes on one date so assigned for one problem, objectifies it into a monistic concept of "*the commencement of war*," and projects such concept as allegedly controlling for other problems in fact raising differing policy issues. Rationality, in fine, in the determination of "when war begins" requires not a marking of one or even a few dates in a calendar, nor a search for one decisive factor, for the applicability *in abstracto* of prescriptions, but rather the clarification of what world community policies are uniquely relevant to varying claims of authority at varying stages in coercion processes. A policy-oriented approach is not a single-factor but a multiple-factor approach; rational policy is not uni-temporal but multi-temporal.

Because of the difficulties thus indicated in isolating the special significance that the stage in the coercion process at which claims are asserted may have from the cumulative impact of all the other factors on decision, it would accordingly appear more rational to study that factor, insofar as it does have, in a particular type of controversy, any special significance, in the course of more comprehensive inquiries into each of the various types of controversies. Such a mode of inquiry might begin with a more careful discrimination of the different types of major recurring controversies and proceed, within each type of controversy, to a more comprehensive itemization of the factors significantly affecting decision.

op. cit. note 2 *supra*, at 267, noted that a "very moderate proposal" of a 24-hour interval made by The Netherlands' Delegation to the Conference of 1907 was rejected; contrast this with the fact that during the days of the ancient *jus fetiale*, provision was frequently made in declarations that hostilities would not begin till after 33 days (See 2 Phillipson, *The International Law and Custom of Ancient Greece and Rome* 200 (1911)). In our own age when rocket missiles and artificial satellites travel at velocities measured in tens of thousands of miles per hour, it would seem somewhat optimistic to suggest, as Professor Castrén does (*op. cit.* note 2 *supra*, at 99), that a "time of grace" or an "intermediary period" should be given in the future.

• For the possible uses of a declaration of war in contexts other than the conduct of hostilities, see Eagleton, "The Form and Function of the Declaration of War," 32 *A.J.I.L.* 19 (1938).

From such contextual orientation, an inquirer might, it is to be hoped, much more effectively seek to perform the various intellectual tasks deemed essential to policy-oriented study, including: the clarification of policies, the observation and comparison through time of past trends in decision, the identification in relative detail of the more significant conditioning elements, the projection of past trends into future probabilities, and the recommendation of preferred alternatives designed to secure the values of a free society.⁵⁵

⁵⁵For further indication of what we refer to as "the values of a free society," see McDougal, *op. cit.* note 21 *supra*, 82 *Recueil des Cours* at 188-191 (1953); McDougal and Leighton, "The Rights of Man in the World Community: Constitutional Illusions versus Rational Action," 59 *Yale L.J.* 60, 60-72 (1949). See also, generally, Lasswell and Kaplan, *Power and Society* (1950); Lasswell, *Power and Personality* (1948); and *id.*, "Political Power and Democratic Values," in Kornhauser (ed.), *Problems of Power in American Democracy* 57-82 (1957).

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CONCESSION AGREEMENTS AND NATIONALIZATION

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It is the purpose of this article to investigate the status of concession agreements in the light of the rules of international law bearing on the power of a state to nationalize property. It is a continuation of an earlier article which explored the nature and function of the concession agreement in the national and international economies.¹ The first article rested on the assumption that legal rules could not be fully understood or evaluated without a fairly clear understanding of the social facts which they were designed to regulate.

A concession agreement reflects one aspect of the process of foreign investment. It is an instrument of co-ordination whereby a state and a foreign investor establish a complementary system of relationships in the conduct of an enterprise for a defined period. It includes the grant by the state to the concessionaire of the privilege to enter into the system of economic relationships defined by the instrument. Its essential character, however, is that of co-ordination, and the grant of privilege by the state is but an incident of the co-ordinated activity contemplated by the agreement. It may more appropriately be termed an international economic development contract.² It is characteristically found to be a means for the development of the mineral resources of the state. It is also found useful in the development of public utilities and in other economic fields.³ It has been said that

a concession always involves a more or less complicated system of rights and duties between the concessionaire on the one hand and the state on the other. This relationship is one of mixed public and private law.⁴

The mere fact that a concession agreement created a system of reciprocal obligations was a sufficient basis for one international court to predicate liability for a unilateral termination by the state not in exercise of a

¹ K. S. Carlston, "International Role of Concession Agreements," 52 *Northwestern U. Law Rev.* 618 (1957).

² Suggested in J. N. Hyde, "Permanent Sovereignty over Natural Wealth and Resources," 50 *A.J.I.L.* 854, 862 (1956).

³ See T. T. F. Huang, "Some International and Legal Aspects of the Suez Canal Question," 51 *A.J.I.L.* 277, 289-296 (1957); K. S. Carlston, note 1 *supra*.

⁴ D. P. O'Connell, *The Law of State Succession* 107 (1956). While others would emphasize the factor of discretionary grant (Huang, note 3 *supra*, at 292; P. Develle, *La Concession en Droit International Public* 56 (1936); *Germany v. Reparations Commission*, Award of M. Beichmann of Sept. 3, 1924, 1 *Rep. Int. Arb. Awards* 429, 478-479 (1948)), it would seem that such quality is merely a necessary condition for elaborating and defining the system of rights and duties comprised in the agreement.

claimed contractual right. The reciprocal character of the instrument was deemed to render illegal its termination at the election of one party.⁵ Certainly we have here one of the most basic of human expectations, namely, the expectation that a solemn promise of another, upon which future action of both promisee and promisor is to be based, will be kept. This is an expectation which any system of law must protect. Its protection is indeed a general principle of law universally recognized by civilized states. Yet international law can hardly make its articulation with municipal law by so crude a means as making its own norm precisely coextensive with the municipal law norm that substantially any breach of a contractual expectation is unlawful. On the other hand, it cannot adopt a rule which would fail to reflect the general principle of protection of contract, if the economic interdependency of states is to be preserved.

It becomes apparent that the circumstances in which a state terminates its contract with an alien are critical. Clearly, a termination in claimed exercise of a contractual right should not by itself engage international responsibility.⁶ When, however, the termination is effected by the exercise of sovereign power instead of claimed contractual right, there is very considerable authority for the proposition that international responsibility to the state of the concessionaire directly and immediately arises.⁷

In the well-known *Delagoa Bay* case,⁷ the disputing states themselves acknowledged a liability for the termination by Portugal of a railway concession and seizure of the concessionaire's property, in that the arbitration was limited to a determination of the amount of reparation due. In rendering its award of May 30, 1900, holding that reparations should be made on the basis of *dommages et intérêts*, that is, for damage sustained and profit lost, the tribunal stated:

Whether one would, indeed, brand the action of the Government as an arbitrary and despoiling measure or as a sovereign act prompted by reason of State which always prevails over any railway concession, or even if the present case should be regarded as one of legal expropriation the fact remains that the effect was to dispossess private persons from their rights and privileges of a private nature conferred upon them by the concession, and that in the absence of legal provisions to the contrary—none of which has been alleged to exist in this case—the State, which is the author of such dispossession is bound to make full reparation for the injuries done by it.⁸

In the *Company General of the Orinoco* case before the French-Venezuelan Mixed Claims Commission of 1902, the Venezuelan Government

⁵ *Cedroni (Italy) v. Guatemala*, Award of Oct. 12, 1898. II. La Fontaine, *Pasicrisie Internationale* 606 (1902).

⁶ *International Fisheries Co. (U. S.) v. Mexico*, General Claims Commission, U. S.-Mex.co, 1931, 4 Rep. Int. Arb. Awards 691, 700 (1951).

⁷ *Delagoa Bay and East African Railway Company (U. S.) v. Portugal*, II. La Fontaine, *Pasicrisie Internationale* 398 (1902); 3 Whiteman, *Damages in International Law* 1694-1703 (1943).

⁸ H. La Fontaine, *op. cit. supra*, at 402; 3 Whiteman, *op. cit. supra*, at 1698.

had unilaterally terminated in 1890 two concession agreements on the ground that the then holder of the concession was a British company, and relations between Great Britain and Venezuela were at that time very tense. The termination of the concessions was held to give rise to an international liability to Great Britain. The tribunal reasoned that the exercise of the power of cancellation by the government was a sovereign act violating the rights of the concessionaire and giving rise to a claim for damage in the amount of the value of the concession at the time. It stated expressly that the judgment rested on the principles of "international law, equity and good conscience."⁹

In the *May* case between the United States and Guatemala involving a claim based on the taking over of a railway concession by the Guatemalan Government, the arbitrator was charged with the duty to "render an award in favor of the party entitled thereto." Compensation was awarded for losses and other sums, including lost profits. In so doing, the arbitrator stated:

If, for imperative reasons of state, the railroad had been withdrawn from May before he had completed the term fixed by his contract, he would have been entitled to all the profit to be derived from the railroad until the completion of the term.¹⁰

In the *El Triunfo Company* case, in which an award was made for the cancellation by El Salvador of a concession agreement, the tribunal quoted with approval the language of Secretary of State Lewis Cass to the effect that:

The case is widely different when the foreign government becomes itself a party to important contracts, and then not only fails to fulfill them, but capriciously annuls them, to the great loss of those who have invested their time, labor, and capital in their reliance upon its good faith and justice.¹¹

In the dissenting opinion of Commissioner Nielsen in the *International Fisheries Co.* case, "an arbitrary cancellation of a concession" was considered to involve a "confiscation of valuable contractual rights and resulting international liability." The majority opinion is not inconsistent with this position in that it stated that "no question of an international wrong arises," for the reason that "The declaration of cancellation in question is quite distinct from a decree of nullification" and rests, instead, on the exercise of "a contractual right to cease performance."¹²

In the *Shufeldt* case, the tribunal ruled that the Guatemalan decree of May 22, 1928, canceling Shufeldt's concession was subject to review by

⁹ *Company General of the Orinoco (France) v. Venezuela*, Opinion of Umpire Plumley, July 31, 1905, Ralston's Report, French-Venezuelan Mixed Claims Commission of 1902, pp. 244 at 322, 360, 365, 367 (1906).

¹⁰ *Robert H. May (U. S.) v. Guatemala*, Award of Nov. 16, 1900, 1900 Papers Relating to the Foreign Relations of the United States 659, 672.

¹¹ *El Triunfo Company (U. S.) v. Salvador*, Award of May 8, 1902, 1902 *ibid.* 859, 862 at 871.

¹² *International Fisheries Co. (U. S.) v. Mexico*, General Claims Commission, U. S.-Mexico, 4 Rep. Int. Arb. Awards 691, 700, 714-714 (1951).

an international court, and held that he was entitled to pecuniary indemnification. The tribunal so ruled, even though it appeared to view the issue involved as contractual.¹³

In the case of the *Anglo-Iranian Oil Co. (Jurisdiction)*,¹⁴ the International Court of Justice could not come to grips with our present problem since the Court ultimately held itself to be without jurisdiction to consider the merits of the case. Jurisdiction was claimed by Great Britain on the basis of a declaration of acceptance of the so-called optional clause of the Statute of the Court (Article 36, paragraph 2) by Iran to the effect that the obligatory jurisdiction of the Court was accepted with respect to "the application of treaties or conventions accepted by Persia and subsequent to the ratification of this declaration." Since the concessionary contract before it could not be categorized as a treaty, the Court held that it was unable to exercise jurisdiction. A suggestion of the attitude of Judge Carneiro with respect to the merits of the case is indicated in his dissenting opinion in which, among other things, it is stated that an invocation of the interests of the nationalizing state would not justify internationally a payment of less than full compensation to a foreigner who was "by the very fact of nationalization . . . cast from the national community in whose favour nationalization has been carried out." Judge Carneiro further stated that a refusal by Iran to set up the arbitral tribunal provided for in the concession agreement "constitutes a denial of justice on the part of the Iranian Government."¹⁵

In numerous other international cases awards or payments have been made for the termination by a government of a concession agreement or governmental interference therewith.¹⁶

¹³ P. W. Shufeldt (U. S.) v. Guatemala, Award of July 24, 1930, Department of State, Arb. Ser. No. 3, pp. 849, 876-877 (1932); 24 A.J.I.L. 799 (1930).

¹⁴ Judgment of July 22, 1952, [1952] I.C.J. Rep. 93; 46 A.J.I.L. 737 (1952).

¹⁵ [1952] I.C.J. Rep. 151 at 162, 166.

¹⁶ H. Milligan (U. S.) v. Peru, U. S.-Peruvian Claims Commission under Convention of December 4, 1868, 2 Moore, International Arbitrations 1643-1644 (1898) (*ex gratia*); North and South American Construction Co. (U. S.) v. Chile, 3 *ibid.* 2318; George L. Hammeken (U. S.) v. Mexico, Mexican Claims Commission under Convention of July 4, 1868, 4 *ibid.* 3470-3472 (injury to rights and immunities of concessionaire by governmental authorities); Central and South American Telegraph Co. v. Chile, 17. S.-Chilean Claims Commission under Convention of August 7, 1892, 3 Whiteman, *op. cit.* note 7 *supra*, at 1679 (interference by government authorities); Dr. Marion A. Cheek (U. S.) v. Siam, Award of March 21, 1898, 5 Moore, *op. cit.* 5069 at 5071; Purnhard, McTaggart, Lowther and Company (Great Britain) v. Colombia, Award of Oct. 17, 1899, H. La Fontaine, *op. cit.* note 7 *supra*, at 544; Martini & Co. (Italy) v. Venezuela, Ralston's Report, Venezuelan Arbitrations of 1903, Sen. Doc. No. 316, 58th Cong., 2d Sess. 819 (1904); Rudloff (U. S.) v. Venezuela, U. S.-Venezuelan Claims Commission, *ibid.* 182; Aboilard (France) v. Haiti, Award of July 26, 1905, 12 Rev. Gén. de Droit Int. Public, Documents 12-17 (1905); Landreau (U. S.) v. Peru, Award of Oct. 26, 1922, 1 Rep. Int. Arb. Awards 352, 356 (1948), 17 A.J.I.E. 157 (1923); The Mavromattis Jerusalem Concessions, P.C.I.J., Judgment of March 26, 1925, Pub. Ser. A, No. 5 (governmental action interfering with exclusivity of a concession; admission by respondent government of lack of power under treaty to effect expropriation).

Diplomatic settlement: Henry W. Thurston (U. S.) v. Dominican Republic, Award

In the *Lena Goldfields, Ltd.* arbitration with the Soviet Union, the arbitral tribunal granted £12,965,000 representing "a fair purchase price for a going concern" by virtue of the loss of a concession agreement through governmental interference, including the secret police. The tribunal reasoned that except for performance inside Russia, the contract contemplated the application of international, rather than national, principles of law.¹⁷ With respect to a provision in the contract that it should only be prematurely terminated by a decision of the arbitration court provided for therein, Dr. Nussbaum said in an article concerning this arbitration that the provision "imposes an obligation *exclusively on the Government*, namely, the obligation not to use its sovereign power of revoking the concession during the contract period, earlier termination of the concession being reserved to the tribunal."¹⁸

The duty to respect concession agreements has been recognized in cases of state succession. D. P. O'Connell states in his exhaustive study that:

The generally consistent practice which has just been analyzed is clearly based on the principle that the acquired rights of a concessionaire must be respected by a successor state.¹⁹

The Harvard Research in International Law on the topic of the Responsibility of States stated that there were numerous cases "where the arbitrary annulment of a contract by the Executive without appeal to the courts was held to justify diplomatic interposition and to render the state responsible."²⁰

There is a growing rule that the legality of questioned state action may be made to depend upon the issue whether the state involved is willing to submit such a question to judicial determination. One of the earliest examples is the provision of Article 1 of the Hague Convention (No. 2) respecting the Limitation of the Employment of Force for the Recovery

of May 20, 1898 (limited to determination of value of property of concession), 1898 Papers Relating to the Foreign Relations of the United States 274-291; *George D. Emery Co. (U. S.) v. Nicaragua*, 1909 *ibid.* 460, 463, 3 Whiteman, *op. cit.* note 7 *supra*, at 1643-1645; *United States and Venezuela Co. (U. S.) v. Venezuela*, 1909 Papers Relating to the Foreign Relations of the United States 624; *Turnbull Manoa Company (Limited) and Orinoco Company (Limited) (U. S.) v. Venezuela*, *ibid.* 626-628, see Ralston's Report, *op. cit.* at 200; *Charles J. Harrah (U. S.) v. Cuba* (1903), 3 Whiteman, *op. cit.* at 1718-1720.

¹⁷ *Lena Goldfields, Ltd. v. U.S.S.R.*, Award of Sept. 3, 1930, 36 Cornell Law Q. 42, 50 (1950).

¹⁸ A. Nussbaum, "The Arbitration between the *Lena Goldfields, Ltd.* and the Soviet Government," *ibid.* 30, 38-39 (1950); see also *Czechoslovakia v. Radio Corporation of America*, Award of April 1, 1932, 30 A.J.I.L. 523, 531 (1936) (rule *pacta sunt servanda* applies to public law agreements).

¹⁹ D. P. O'Connell, *The Law of State Succession* 129, 131-132 (1956).

²⁰ 23 A.J.I.L. Spec. Supp. 171 (1929); see also C. Eagleton, *The Responsibility of States in International Law* 165 (1928); 2 Hyde, *International Law Chiefly as Interpreted and Applied by the United States* 990-991 (2d rev. ed., 1945); E. M. Borchard, *The Diplomatic Protection of Citizens Abroad* 292-294, 336 (1915); C. Rousseau, *Droit International Public* 370-371 (1953) (state becomes responsible upon enactment of legislation violating its international obligations).

of Contract Debts. This article embodies the so-called Porter Proposition and provides that a state may not use force to recover contract debts owed its nationals by another state unless "the debtor State refuses or neglects to reply to an offer of arbitration, or after accepting the offer, prevents any *compromis* from being agreed on, or, after the arbitration, fails to submit to the award."²¹ Under Article 33 of the Charter of the United Nations, the parties to a dispute are required, first of all, to seek a solution thereof by peaceful means, including arbitration and judicial settlement.

Among the circumstances indicating whether such annulment is arbitrary, or as we have previously defined the issue, whether the termination of a concession agreement by a state is in fact an exercise of a claimed contractual right, is the willingness of such state to submit the issues leading to such termination to judicial or arbitral determination. The refusal by the state to submit the validity of such termination to arbitration, in violation of an arbitration clause in the concession agreement, has been held to create international responsibility to the state of the concessionaire.²²

The availability of the arbitral process is of peculiar significance in the resolution of disputes which must inevitably arise in the long-term arrangements usually provided for in a concession agreement. The agreement typically contains a clause requiring resort to arbitration as a means for settling such disputes. Provision is thereby made for dealing in a regularized and impartial manner with the problems of changed conditions arising in the course of the term of the contract.

As stated in one international arbitration between a private corporation and a state, the fact that the state has not realized its expectations of profit cannot be considered sufficient reason for releasing the state from its obligations as signatory of the concession agreement.²³ Nevertheless, with the passing of the years, new and unanticipated conditions may arise creating unexpected hardships upon one of the parties. It is at this point that the presence of arbitration clauses in concession agreements becomes of critical importance. The right to rely upon arbitration as a means for the solution of difficulties arising out of the contractual relationships of the parties has, among other forces, led to the creation of a type of "living law" of the contract that the parties will, first of all, negotiate in good faith in an effort to resolve their disputes.

When such negotiation fails, then there is always available the arbitral process and usually under the contract it becomes the duty of the parties to resort to arbitration to settle their difference. In appreciating the situa-

²¹ J. B. Scott, *The Hague Conventions and Declarations of 1899 and 1907*, p. 459 (1915).

²² *North and South American Construction Co. (U. S.) v. Chile*, 3 Moore, *International Arbitrations* 2318 (1898); see also *Rudloff (U. S.) v. Venezuela*, U. S.-Venezuela Claims Commission, Ralston's Report, *op. cit.* note 16 *supra*, at 182. C. De Visser states that responsibility for the cancellation of a concession contract arises if there is a failure to arbitrate the issues in question pursuant to an arbitration clause in the contract. *Theory and Reality in Public International Law* 194 (1957).

²³ *Czechoslovakia v. Radio Corporation of America*, Award of April 1, 1932, 30 A.J.I.L.L. 513, 534 (1936).

bility of the arbitral tribunal for this purpose, it must be remembered that, unless otherwise restricted in the arbitration clause, it does not sit exclusively as a court of law, applying the law of the contract under the law of the state, but also as a tribunal of justice and equity.

The problem at hand reveals another legal aspect when we appreciate that we are here concerned with a situation in which, in reliance not only upon the system of laws of the capital-importing country in the matter of the protection of property but also upon the covenants of that state as expressed in an international concession agreement, a foreign investor establishes in such country an enterprise which becomes a part of the functioning of the international community. We are positing that this enterprise is a source of mutual advantage. In these circumstances, it is submitted that to expropriate the enterprise constituted by the concession agreement through the unilateral exercise of sovereign power and thereby to deprive the foreign state, in the person of its national, of the wealth represented by the enterprise and to cause it to become the exclusive property of the expropriating or nationalizing state, is to result in an unjust enrichment. The interdependency of states reinforces the conclusion that no state shall take advantage of the fact that the resources of another state have entered into its territorial sphere and enrich itself with such resources at the expense of its neighbor.

The principle of unjust enrichment (*enrichissement sans cause*) is one of the general principles of law recognized by civilized nations.²⁴ This principle is based on the fact that there are circumstances in which the acquisition by one person of property interests of another will be generally conceded, in all justice, to require restitution in kind or in value. The existence of this principle and the necessity of its application was recognized in the *Landreau* case involving a guano concession.²⁵

O'Connell states, in connection with the obligation of a successor state to recognize a concession granted by its predecessor, that:

The expropriation of a concession, however, is only justified when accompanied by a recognition of the equities involved. . . . For the successor State to ignore this expenditure of capital and labour, and to appropriate to itself the benefits accruing therefrom, is unjustifiably to enrich itself. The concessionaire's equitable interest is an acquired right constituted by his activity, and international law imposes on the successor State a correlative duty to make restitution to the extent of its enrichment.²⁶

It should be clearly understood, however, that the international liability of a nationalizing state in the circumstances of this inquiry does not arise *solely* from the aspect of unjust enrichment. That liability is a result of the circumstance of unjust enrichment, but it is also a product of the

²⁴ See the brilliant comparative law study of J. P. Dawson, *Unjust Enrichment, A Comparative Analysis* (1951).

²⁵ *Landreau (U. S.) v. Peru*, Award of Oct. 26, 1922, 1 Rep. Int. Arb. Awards 352, 364.

²⁶ D. P. O'Connell, *op. cit.* note 19 *supra*, at 131-132 (1956).

application to its act of the other principles or propositions set forth herein. It is most important to realize this fact, since it is of critical analytical importance in determining the legal consequences of the act of nationalization.

Thus the cases reveal the dichotomy upon which the international legal process will operate. If the act of termination be in the *bona fide* exercise of a claimed contractual right, it is to be deemed an act *jure gestionis* and the rule of exhaustion of local remedies and the requirement of denial of justice therein applies. On the other hand, if the act of termination be in the exercise of sovereign power independently of contractual right, it is an act *jure imperii* of which international law may directly take cognizance and which may be held to be a violation of a right of the state of the concessionaire.

In either event, the interests of the international society are protected. If the termination be in the exercise of a claimed contractual right, it may be said that the normal and usual expectation of the contracting parties would be that any dispute resulting therefrom would be adjusted by resort to the local courts. There is in such case no impairment of the security of the transaction if such resort be required as an antecedent to establishing international responsibility. If the termination be in the exercise of sovereign power, then the security of the transaction is directly protected by international law, the termination being deemed a violation of a duty owed the state of the concessionaire.

Viewed simply as a property interest and as a problem in the protection of private property abroad, concession agreements may, in addition, be regarded to fall under the rule that the property of aliens shall not be expropriated except against adequate compensation promptly paid.

Their protection has been justified by the theory that the "rights or exploitation emanating from concessions which are also embodied in an undertaking, a plan or a definite object" are a vested or subjective right entitled to legal protection in the international sphere.²⁷ The Permanent Court of International Justice has held that the property interests involved in a concession are subject to protection under international law in the sense that the "principle of respect for vested rights . . . forms part of generally accepted international law." The Court stated that the expropriation of the property of aliens permitted under Head III of the Geneva Convention is of an exceptional character in that it "is a derogation from the rules generally applied as regards the treatment of foreigners and from the principle of respect for vested rights."²⁸ It found it necessary, however, only to go as far as to hold that the expropriation in question, namely, the taking over by Poland of the Chorzów factory, was a violation of the Geneva Convention and that reparation was due.

²⁷ *Jablonsky v. German Reich*, June 24, 1936, 1935-1937 Annual Digest and Reports of Public International Law Cases, Cas. No. 42, p. 140 (1941).

²⁸ Case concerning Certain German Interests in Polish Upper Silesia (The Merits), May 25, 1926, P.C.I.J., Pub. Ser. A, No. 7, p. 42, see also p. 22; Case Concerning the Factory at Chorzów, July 26, 1927, *ibid.* No. 9, p. 27.

The American and Panamanian General Claims Commission stated that:

It is axiomatic that acts of a government in depriving an alien of his property without compensation impose international responsibility.²⁹

This result, it held, should apply even in a case where the state was in the process of working out a system of land administration.

Similarly, in the *Norwegian Shipowners' Claim*, involving the requisitioning by the United States of contracts for the building of ships, "just compensation" was held to entail an obligation for

a complete restitution of the *status quo ante*, based, not upon the future gains of the United States or other powers, but upon the loss of profits of the Norwegian owners as compared with other owners of similar property.³⁰

We have above referred to the rule of international law that a confiscatory breach by a state of a concession agreement entails direct responsibility therefor to the state of the concessionaire.³¹ However, considering the instant problem as one involving the protection of property of aliens under international law, it has been said that a state which has been injured as a result of an insufficient indemnity in the case of the nationalization of the property of its citizens by another state has a right to exercise diplomatic protection and to take conservatory measures.³² The rule has been affirmed by a number of authorities that a violation of international law occurs on the taking by a state of foreign property against insufficient compensation.³³

The principle of respect for private property also appears in other contexts in international law, as in the case of the right of angary and the rule of war that "private property cannot be confiscated."³⁴

While international law has been criticized as failing generally to give clear guidance on specific rules or problems, as distinguished from questions of broad principle,³⁵ we have seen that there is an unusual amount

²⁹ *Marguerite de Joly de Sabla (U. S.) v. Panama*, U. S.-Panama General Claims Commission, Award of June 20, 1933, Report of Bert L. Hunt, Department of State, Arb. Ser. No. 6, 1934, p. 432 (1934), 28 A.J.I.L. 602 (1934); *Walter Fletcher Smith (U. S.) v. Cuba*, Award of May 2, 1929, 24 A.J.I.L. 384 (1930).

³⁰ 1 Rep. Int. Arb. Awards 309, 338 (1948); 17 A.J.I.L. 362 (1923).

³¹ *E.g.*, note 20 *supra*.

³² 1 Guggenheim, *Traité de Droit International Public* 336 (1953).

³³ 1 Sibert, *Traité de Droit International Public* 515 (1951); 1 Hyde, *International Law Chiefly as Interpreted and Applied by the United States* 710-711 (2d rev. ed., 1945); C. Rousseau, *Droit International Public* 372 (1953); 2 Scelle, *Précis de Droit des Gens* 113 (1934); J. H. Herz, "Expropriation of Foreign Property," 35 A.J.I.L. 243 (1941); C. C. Hyde, "Confiscatory Expropriation," 32 A.J.I.L. 758, 760-761 (1938), and "Compensation for Expropriations," 33 *ibid.* 108, 112 (1939) (questions legality of power to expropriate if adequate compensation cannot be given aliens).

³⁴ Hague Conventions of 1899 (II) and 1907 (IV) Respecting the Laws and Customs of War on Land, Regulations, Art. 46. J. B. Scott, *op. cit.* note 21 *supra*, at 123, 129, 131 (1915).

³⁵ H. Lauterpacht, "Codification and Development of International Law," 49 A.J.I.L. 17, 19 (1955).

of a theory, supported by several bases of justification, to sustain the view that concession agreements are protected against their nullation or termination by the state in the exercise of sovereign power as against the exercise of contractual right. Before turning to the question of the degree to which this rule may be affected by the circumstance that the termination of a concession agreement by a state is accomplished through measures of nationalization, it is believed desirable to explore certain aspects of the problem in private international law.

The unity or universality of the concession agreement, the fact that it involves the co-ordination of activity extending beyond the confines of a single state, has been recognized. In discussing the autonomy of the parties to select their own governing law, Donnedieu de Vabres notes that French jurisprudence has developed a general theory of the international contract. He states that it is the nature of its economic operation which confers upon a contract its international character and that certain operations by their nature fall within the internal economic life of a state while others, by contrast, fall within the international economic life. He concludes that the jurisprudence demonstrates that there is

an international economic activity escaping the sovereignty of individual legislative bodies and cloaked by its own juridical regulation, incapable of being reduced to the simple confines of internal laws in conflict.³⁶

Niboyet takes up the analogous situation of a business concern (*fond du commerce*) which in its functioning comprehends several states, and concludes:

By virtue of the phenomenon of frontiers which come between home offices and various branch offices, each state may provide a different set of rules for the branches which are on its territory and subject to its control. The universality of the business concern cannot be realized unless all of its parts are in the same country (which is the case in a national business concern), otherwise there results a veritable juridical splitting-up.³⁷

While confiscatory legislation must be given application by the courts of a state in which judicial review on the basis of opposition to international law is impossible, both international courts and courts of other

³⁶ J. Donnedieu de Vabres, *L'Évolution de la Jurisprudence Française en Matière de Contentieux de Lois* 553-561, quotation at 561 (1938) (translation). In the *majora* of Switzerland in the *Losinger & Co.* case, it was contended: "In a wide sense the notion of international obligations, or engagements, covers not only those existing directly between States, but also those existing between States and private individuals protected by their governments, when such engagements produce international repercussions and when, by their origin or their effects, they extend in reality to several countries." P.C.I.J., Pub. Ser. C, No. 78, p. 128.

³⁷ Niboyet, *Traité de Droit International Privé* 630-633, quotation at 632-633 (1917) (translation). "There is no reason why a municipal court which may take cognizance of international law incidentally, should not also apply it directly so as to secure the submission of a single and indivisible instrument under a single legal system." F. A. Maun, "The Law Governing State Contracts," 21 *British Year Book of International Law* 11, 22 (1944).

states may refuse to give application to such legislative action as it impinges upon the international society and if it is violative of international law.³⁸

In a series of cases growing out of the attempts by the Anglo-Iranian Oil Company, Limited, to recover its nationalized oil in tankers at various world ports, examination was made of the above proposition. Judge Lauterpacht examines these cases and reaches the conclusion that they either support, or are not inconsistent with, the stated proposition.³⁹ A critical analysis of these cases also appears in a recent study by D. P. O'Connell.⁴⁰ The cases bear directly on the problem before us, since the question at issue was whether the Iranian termination of its concession agreement through purported acts of nationalization was violative of international law.

In the *Rose Mary* case, recovery of the claimed oil was granted on the theory that inasmuch as the expropriatory legislation was confiscatory, "following international law as incorporated in the domestic law of Aden, this court must refuse validity to the Persian Oil Nationalization Law in so far as it relates to nationalized property of the plaintiff which may come within its territorial jurisdiction."⁴¹

In a decision of an Italian court, it was held that the Iranian law could be examined to determine whether it was confiscatory and it was held that *prima facie* a procedure for compensation existed.⁴² A Tokyo court, however, felt itself unable to enter into the difficulties of determining whether the legislation in question was compensatory.⁴³

³⁸ H. Lauterpacht, *Recognition in International Law* 420 (1947); 1 Oppenheim (ed. H. Lauterpacht), *International Law* 270 (8th ed., 1955); F. Morgenstern, "Recognition and Enforcement of Foreign Legislative, Administrative and Judicial Acts which are Contrary to International Law," 4 *Int. Law Q.* 326, 329 (1951); B. A. Wortley, "Expropriation in International Law," 33 *Grotius Society Transactions* 25, 30, 31 (1947); Wolff v. Oxholm, [1817] 6 M & S 92; In re Fried Krupp A/G, [1917] 2 Ch. 188; Confiscation of Property of Sudeten Germans Case, Dec. 7, 1948, 1948 *Annual Digest and Reports of Public International Law Cases*, Cas. No. 12, pp. 24-25 (1953); Anglo-Czechoslovak and Prague Creditbank v. Janssen, [1943] V.L.R. 185; N. V. de Bataafsche Petroleum Maatschappij & Ors. v. The War Damage Commission, Singapore Court of Appeal, April 13, 1956, 22 *Malayan L. J.* 155 (1956); 51 *A.J.I.L.* 802 (1957).

³⁹ 1 Oppenheim, *op. cit.*, at 269, note.

⁴⁰ D. P. O'Connell, "A Critique of Iranian Oil Litigation," 4 *Int. & Comp. Law Q.* 267 (1955); see, however, R. Delson, "Nationalization of the Suez Canal Company: Issues of Public and Private International Law," 57 *Columbia Law Rev.* 755, 776-778 (1957).

⁴¹ *Anglo-Iranian Oil Co. Ltd. v. Jaffrate*, [1953] 1 *Weekly L. R.* 246, 259; 47 *A.J.I.L.* 325 (1953); 1953 *Int. Law Rep.* 316 (Lauterpacht). In a later decision commenting on the *Rose Mary* case, the court stated that it did not "challenge the correctness of the decision . . . upon the facts" but that it did not wish to go so far as to say that "confiscation without adequate compensation is per se a ground for refusing recognition to foreign legislation." In re Claim by Helbert Wagg & Co. Ltd., [1956] 2 *Weekly L. R.* 183, 195-197, [1956] 1 Ch. 323, 346-349; 50 *A.J.I.L.* 683 (1956).

⁴² *Anglo-Iranian Co. v. Societa Unione Petrolifera Orientale di Roma*, 67 *Il Gazzettino*, No. 61, p. 4, abstracted in D. P. O'Connell, note 40 *supra*, at 283-284; and 47 *A.J.I.L.* 509 (1953).

⁴³ *Anglo-Iranian Co. Ltd. v. Idemitsu Kosan Co. (YO)* 2, 942 (1953), 1953 *Int. Law Rep.* 305; abstracted in O'Connell, *loc. cit.* at 280-283.

As the discussions in 1952 of the *Institut de Droit International* reveal, the formulation of a definition of the term "nationalization" is a difficult task.⁴⁸ The definition of nationalization tentatively adopted by the *Institut* was as follows:

Nationalization is the transfer to the State, by a legislative act and in the public interest, of property or private rights of a designated character, with a view to their exploitation or control by the State, or to their direction to a new objective by the State.⁴⁹

Nationalization may be said to include measures for the transfer to, or control by, the state, in the exercise of a public purpose, of a defined category of property. Whether any such taking is confiscatory or against partial or full compensation seems irrelevant insofar as a definition of the term is concerned, though highly relevant as to the legal issues involved.

We have refrained from entering into an intense investigation of the question of the responsibility of the state for the expropriation of property of aliens. This has been most thoroughly investigated in the literature.⁵⁰ We instead have confined ourselves to affirming the rule which seemed to be fairly settled, independently of the nationalization precedents now to be discussed, that the property of aliens is not to be expropriated by a state except against adequate compensation promptly paid.⁵¹

We have also laid down the rule that the interest of the concessionaire was protected against acts of the state bringing the concession agreement to an end through the exercise of sovereign power as distinguished from contractual right. We saw that there was an unusual solidity of proof in support of this rule. We must now determine whether this proposition is affected by modern state practice in the sphere of nationalization. The Mexican and Iranian oil nationalizations are those which most directly concern us.

On November 23, 1936, the Expropriation Law was enacted by Mexico. On March 18, 1938, the properties of seventeen oil companies were expropriated by decree. The Mexican Government had also for some time been engaged in the nationalization of foreign-owned land in a program

⁴⁸ 44 *Annuaire de l'Institut de Droit International* (II) 279 *et seq.* (1952).

⁴⁹ *Ibid.* 283, translation; see also J.E.S. Fawcett, note 46 *supra*, at 355-356.

⁵⁰ See bibliographies in S. Friedman, *Expropriation in International Law* (1953); M. Domke, "American Protection against Foreign Expropriation in the Light of the Suez Canal Crisis," 105 U. Pa. Law Rev. 1033, 1041, note 51 (1957). For other studies of the problem of nationalization, see G. Viénot, *Nationalisations Étrangères et Intérêts Français* (1953); C. Rousseau, *Droit International Public* 370 *et seq.* (1953); C. J. Olmstead, "Nationalization of Foreign Property Interests, Particularly Those Subject to Agreements with the State," 32 N.Y.U. Law Q. Rev. 1122 (1956); N. R. Doman, "Postwar Nationalization of Foreign Property in Europe," 48 *Columbia Law Rev.* 1125 (1948); A. Drucker, "Compensation for Nationalized Property: The British Practice," 49 *A.J.I.L.* 477 (1955); E. D. Re, "Nationalization of Foreign Owned Property," 36 *Minn. Law Rev.* 323 (1952); S. J. Rubin, "Nationalization and Compensation: A Comparative Approach," 17 *U. Chicago Law Rev.* 458 (1950).

⁵¹ See discussion, notes 27-34 *supra*.

of Iranian reform. American-owned landholdings, chiefly farms of moderate size, of the value of over \$10,000,000 had been expropriated by 1938.⁵²

A settlement was reached in 1941 whereby American oil properties were to be appraised by two experts to be appointed by the two governments, respectively. Their joint report was to be made the basis of compensation. Mexico agreed to pay \$9,000,000 as an initial deposit. The two governments accepted the report of the two experts, made on April 17, 1942. The United States Government stated that:

This report placed an evaluation of \$23,995,991 on the losses sustained by American nationals, including all elements of tangible and intangible value, and provided for interest at three percent per annum from March 18, 1938 to the date of final settlement on all balances due; in conformity with the basic agreement, the evaluation was final. (Italics supplied)

The sum thus found to be due, less the deposit of \$9,000,000, was to be paid in five annual installments beginning in 1943.⁵³ By the Claims Convention of November 19, 1941, Mexico agreed to pay the United States \$40,000,000 at the rate of \$2,500,000 a year.⁵⁴ Great Britain effected a settlement for the expropriation of its oil properties in Mexico of \$130,000,000, payable in fifteen annual installments.⁵⁵

The Iranian oil expropriation of 1951 was couched in general terms as a nationalization of "the oil industry throughout all parts of the country, without exception."⁵⁶ In practical effect it was directed to the expropriation of the properties of the Anglo-Iranian Oil Company, Limited, and the consequent termination of its Concession Agreement of April 29, 1933.

The International Court of Justice ruled that it lacked jurisdiction to hear the resulting dispute between Great Britain and Iran.⁵⁷ Among other things, it held that the Concession Agreement was not an international convention within the terms of the Iranian declaration accepting the compulsory jurisdiction of the Court. Negotiations thereafter took place between the Iranian Government and a consortium of eight international oil companies, including Anglo-Iranian Oil Company, Limited. These resulted in the establishment of a new Concession Agreement of September 19, 1954, with such companies for a minimum period of twenty-five years, subject to extension. There was a settlement of claims and counterclaims between Iran and Anglo-Iranian Oil Company, Limited, resulting in a net sum of 25 million pounds, or about \$70,000,000, which Iran agreed

⁵² J. L. Kunz, "The Mexican Expropriations," 17 N.Y.U. Law Q. Rev. 327 (1930).

⁵³ 9 Dept. of State Bulletin 230 (1943).

⁵⁴ Exchange of notes of Nov. 19, 1941, 55 Stat. 1554 (1941-1942); Convention of Nov. 19, 1941, 56 Stat. 1347 (1942); L. H. Woolsey, "The United States-Mexican Settlement," 36 A.J.I.L. 117 (1942); H. W. Briggs, "The Settlement of Mexican Claims Act of 1942," 37 *ibid.* 222 (1943).

⁵⁵ C. Rousseau, *Droit International Public* 372 (1953).

⁵⁶ A. W. Ford, *The Anglo-Iranian Oil Dispute of 1951-1952*, p. 268 (1954); I.C.J., *Anglo-Iranian Oil Co. Case, Pleadings, Oral Arguments, Documents*, p. 36.

⁵⁷ A. W. Ford, *op. cit.* at 233; I. C. J., *op. cit. supra* at 20.

⁵⁸ Note 14 *supra*.

to pay the company in ten annual installments.⁵⁹ The new Concession Agreement appears to have been regarded in part as a reaffirmation and sharing of the rights and privileges of the earlier concession, since on October 29, 1954, it was announced that the seven other oil company parties had agreed to pay Anglo-Iranian Oil Company, Limited, a sum which would amount to more than \$600,000,000 for its share in the concession.⁶⁰

The legality of expropriation of foreign property in the course of the agrarian reforms of the Eastern European states following World War I was most vigorously and exhaustively debated in connection with the so-called *Hungarian Optants* case.⁶¹ The position of Hungary that expropriation without compensation was prohibited by international law and by Articles 232 and 250 of the Treaty of Trianon appears to have prevailed in the discussions in the League of Nations in 1928,⁶² and in the reasoning of the Permanent Court of International Justice in the *Chorzów Factory* case.⁶³ A special Agrarian Fund was created for the payment of claims arising out of the agrarian legislation of Rumania, Czechoslovakia and Yugoslavia.⁶⁴

The Russian expropriations following the Revolution of 1917 and the establishment of the Soviet state were all-embracing in their inclusion of means of production and capital, whether or not foreign-owned. The courts of Western states uniformly refused to recognize the extraterritorial effects of acts of confiscation, and varied in their approaches to the problem of the recognition of their internal effects upon property within the territory of Russia.⁶⁵ In the diplomatic sphere, the problems raised were massive and insoluble upon any other basis than a political one.

The wide-scale postwar nationalizations of property in Great Britain and Europe caused certain views to be expressed which had first appeared in connection with the Hungarian-Rumanian land dispute mentioned above.⁶⁶ These were to the effect that fundamental changes in the political system or economic structure of a state justify interference on a large

⁵⁹ Hearings before the Antitrust Subcommittee (Subcommittee No. 5) of the Committee on the Judiciary, House of Representatives, 84th Cong., 1st Sess., Pt. II, May 23-June 6, 1953, Serial No. 3, pp. 1563, 1644.

⁶⁰ N. Y. Times, Oct. 30, 1954, p. 6, col. 3.

⁶¹ A brief history and analysis of some of the legal issues involved in the dispute will be found in K. S. Carlston, *The Process of International Arbitration* 116-126, 176-184 (1946); see F. Deák, *The Hungarian-Rumanian Land Dispute* (1928); *Some Opinions, Articles and Reports Bearing upon the Treaty of Trianon and the Claims of the Hungarian Nationals with regard to their Lands in Transylvania* (2 vols., 1929).

⁶² See K. S. Carlston, *op. cit. supra*, at 181.

⁶³ Note 28 *supra*.

⁶⁴ Agreements Concluded at the Hague Conference, January, 1930, p. 373 (1930); see Pajzs, Czák, Esterházy Case, Judgment of Dec. 16, 1936, P.C.I.J., Ser. A/B, No. 68.

⁶⁵ Notes 38, 50 *supra*.

⁶⁶ See selection of a minority of writers noted in J. L. Kunz, note 52 *supra*, at 337.

scale with private property and may justify partial compensation to aliens.⁶⁷ It is not believed that theory or practice will justify such a conclusion in the sphere which concerns us, namely, the status of concession agreements.

It will be recalled that the League of Nations addressed itself to the question whether the fact that the rights of a concessionaire under his contract were impaired by legislation, rather than through executive action, would entail international responsibility. The conclusion was reached that if such legislation directly impaired contractual rights, international responsibility would be incurred for damage thereby sustained by the foreigner, but that the circumstances of the particular case must be examined when the legislation was of a general character.⁶⁸ Judge Lauterpacht has said that

There may be little difference between a Government breaking unlawfully a contract with an alien and a Government causing legislation to be enacted which makes it impossible for it to comply with the contract.⁶⁹

The circumstance that the termination of the concession agreement is effected through legislation, which will render clear the finality of the state act, points rather conclusively to the conclusion that the termination was in the exercise of sovereign power rather than contractual right, and usually will render resort to the courts fruitless. If the courts of the state are precluded from any inquiry into the validity in international law of such an act, then a violation of a right of the state of the concessionaire arises.⁷⁰

The straitened circumstances of the nationalizing state do not by themselves afford any basis for the international validation of its act. A state may not rely on its own law with a view to evading its international obligations.⁷¹ Justice Holmes once remarked: "In general, it is not plain that a man's misfortunes or necessities will justify shifting the damages to his neighbor's shoulders."⁷² To this remark the observation may be added that the postwar practice of nationalization of foreign property against inadequate compensation may be regarded as a type of imperialism in reverse.

⁶⁷ 1 Oppenheim (ed. H. Lauterpacht), *International Law* 352 (8th ed., 1955); Draft Resolutions on the International Effects of Nationalization, Art. 11, 43 *Annuaire de l'Institut de Droit International* (I) 69 (1950); A. Verdross, *Voelkerrecht* 231 (3d ed., 1955) (emphasizing confiscations in East European states and requirement, in any event, of full compensation for expropriation of "special assets").

⁶⁸ League of Nations, Conference for the Codification of International Law, *Records of Discussion*, Vol. 3, C. 75. M. 69.1929. V. at pp. 30, 33. has said that:

⁶⁹ Individual opinion in *Case of Certain Norwegian Loans*, Judgment of July 6th, 1957, [1957] I. C. J. Rep. 9, 37.

⁷⁰ P. Reuter, "Quelques remarques sur la situation juridique des particuliers en Droit international public," 2 *La Technique et les Principes du Droit International Public*, *Études en l'Honneur de Georges Scelle* 535, 543 (1950); see note 20 *supra*.

⁷¹ *Case of the Free Zones of Upper Savoy and the District of Gex* (Second Phase), Order of Dec. 6th, 1930, P.C.I.J., Pub. Ser. A, No. 24, p. 12; *Treatment of Polish Nationals in Danzig*, Advisory Opinion of Feb. 4, 1932, *ibid.*, Ser. A/B, No. 44, p. 24.

⁷² *Pennsylvania Coal Co. v. Mahon*, 260 U. S. 393, 416 (1922).

As a matter of municipal law, the citizens of a state may be afforded less than full compensation "because in such a case, each individual affected, as a member of the same community, is enriched, at the same time, by the sacrifices of others. . . . This explains the diminishing scale of compensation as the circle of individuals affected widens."⁷³ Internationally, however, any such justification fails. As stated by Judge Carneiro in his dissenting opinion in the *Anglo-Iranian Oil Co.* case, "such a justification cannot be put forward as applying to foreigners who, by the very fact of nationalization, have been cast from the national community in whose favour nationalization has been carried out."⁷⁴

The foregoing nationalization precedents may be regarded essentially as presenting a legal situation in which, in the words of the International Court of Justice, "the practice has been so much influenced by considerations of political expediency in the various cases, that it is not possible to discern in all this any constant and uniform usage, accepted as law, with regard to the alleged rule."⁷⁵

Only two of these precedents bear on the issue at hand, *i.e.*, the status of concession agreements. As noted above, these are the Mexican and Iranian oil expropriations. Both were influenced by political considerations in their final outcome. In each the injured state firmly maintained its legal position. In the Mexican expropriations, "intangible value" was taken into consideration in the settlement. The Iranian expropriation ended in the constitution of a new concession agreement in which Iran agreed to pay Anglo-Iranian Oil Company, Limited, for damages, and the new participants agreed to pay the company for sharing in the enterprise.

The practice of global settlements in connection with the settlement of disputes arising out of the postwar European nationalizations does not vary the conclusions we have reached. As pointed out by Viénot, the formula of a global settlement should be viewed only as a useful procedure enabling, in practice, a concrete agreement to be reached between two states of a different juridical character for the purpose of settling their differences. For the nationalizing state, it permits a general liquidation to be made of the private interests of the subjects of the other. For both states, the nationalizing and the investing state, they are thereby freed from all differences interfering with the development of their mutual relations.⁷⁶

No clear affirmation of a rule of international law appears to have been involved in the determination of the global settlements. They were primarily a product of the political rather than the legal process. The issues in the negotiation of such settlements were regarded as primarily property issues and no question of the status of any foreign concession agreements

⁷³ B. Cheng, "Expropriation in International Law," 21 *The Solicitor* 98, 100 (1954).

⁷⁴ Note 14 *supra*, at 162.

⁷⁵ *Colombian-Peruvian Asylum Case*, Judgment of Nov. 20, 1950, [1950] I. C. J. Rep. 266, 277; 45 A.J.I.L. 179 (1951).

⁷⁶ G. Viénot, *op. cit.* note 50 *supra*, at 273.

appears to have been involved. Friedman, in his study of *Expropriation in International Law*, in which he vigorously supports the power of a state to nationalize property, goes so far as to say that "the expropriation may apply to all movable and immovable property rights, with an exception of contractual rights." (Italics supplied.) The latter he regards as being outside the sphere of law relating to nationalization and subject to the rules of international law relating to denial of justice, though he does not admit the principle of confiscatory breach.⁷⁷ Professor de La Pradelle, as *Rapporteur* at the 1950 meeting of the *Institut de Droit International*, affirmed that: "Nationalization, as a unilateral act of sovereignty, shall respect validly concluded agreements, whether by treaty, or by contract."⁷⁸ On our part, we need only go so far as to state the obvious proposition that the evidence of the law must be examined and weighed in its entirety. The validity of a unilateral termination by a state of a concession agreement through nationalization cannot be determined solely in terms of the nationalization precedents and its property concepts.

We have not discussed the nationalization by Egypt of the Universal Suez Maritime Canal Company by the Egyptian Government on July 26, 1956, as it has not as yet been resolved. The governments of France, the United Kingdom and the United States, however, took the position that the power of Egypt to nationalize property could not extend to an institution or agency international in character and impressed with an international interest. They stated that the seizure was made for national purposes, rather than for the international purpose as established by the Convention of 1888.⁷⁹

CONCLUSION

Our world is experiencing a number of social revolutions. Some of these are revolutions having relatively little to do with questions of value. The technological and organizational revolutions are of such a character. Other revolutions reflect wide disparities in the value systems of national societies. If a state is to exist, there must be a high degree of consensus as to goals and as to the value significances of those goals among its members. One society may find its only significant way of life to lie in the Marxian interpretation of history and dialectic. Another society may

⁷⁷ S. Friedman, *op. cit.* note 50 *supra*, at 220-21, 157; with respect to confiscatory breach, see note 20 *supra*.

⁷⁸ 43 *Annuaire de l'Institut de Droit International* (I) 67 (1950). No final decision was taken by the Institute on this matter, action being postponed to a later date. *Id.* (II) 324 (1952); cf. the more restrictive view of Dr. F. V. Garcia Amador in his Second Report on International Responsibility of States to the International Law Commission, A. T. 7, U. N. Doc. A/CN. 4/106, Feb. 15, 1957.

⁷⁹ Declaration of August 2, 1956, Department of State, The Suez Canal Problem, July 26-September 22, 1956, p. 34 (1956). Secretary Dulles said: "We also took the position that the action taken by Egypt in terminating the concession . . . prior to the agreed date, was an improper act." Press Release, Jan. 16, 1958, 38 Dept. of State Bulletin 165-166 (1958). See discussions in *Proceedings of the American Society of International Law*, 1957.

find in a highly emotional spirit of nationalism and hostility towards Western states its only means of integration. These processes of change inevitably have their effect upon interstate relations and subject the system of international law, a product of an earlier era and perhaps a different value system, to great stresses.

Yet whatever may be the character of the national society, whether it be in the free world or the Communist world, there are certain fundamental aspects of interstate relations which no state can escape. The problem at hand involves just such aspects.

Both the Communist world and the free world have found their own sources of supply of goods. In mineral resources, each is largely independent of the other and interdependent within its own sphere. Each is characterized by states possessing different cultures and varying endowments of factors of national power, such as geographical location, possession of natural resources and population and organizational growth. Each is characterized by international trade. Each possesses its own underdeveloped states.

Unless an underdeveloped state is to "mine" its own people and out of the fruits of their labor provide its own means for the accumulation of capital equipment, it must turn to foreign sources for the supply of capital equipment. It must do so on some basis involving long-term repayment. The moment when any such transaction takes place, at that moment the process of foreign investment takes place. Whether the foreign investor be a state or a private corporation, whether it holds a creditor or an equity position, it is the reputation for probity and integrity of the recipient of the investment which determines whether the investment shall be made and what its terms shall be. Contracts, and the expectation that contractual promises will be kept, are as much a reality for investment between states in the Communist sphere as they are for states in the free world. Indeed, this may well be one of the reasons for Soviet insistence upon the paramountcy of its will in the Communist world. Asserting absolute sovereignty as the prime postulate of international law, asserting as a consequence the freedom of any state to nationalize property, it must look largely to force instead of law as a means for securing its bases of power and the protection of its investments in other states in its sphere of interest.

It is believed that the principles set forth above grow out of one of the most basic of human expectations, an expectation existing in all societies, that is, the expectation that a solemn promise of another, upon which future action is to be based, will be kept. They provide protection to the interests of the national, as well as the international, society. They accommodate in a reasonable manner the divergent claims of producing, consuming and investing nations. They represent an integrated means for the orderly growth of the international society in a manner consistent with the interests of the states members of that society. They avoid interstate conflict by saying, in effect, to a nationalizing state: "You may, if you insist, resort to the exercise of the principle of absolute sovereignty;

your law, if you wish, reign supreme in your territory without regard to your commitments to the international society; but the international society will deny legal effect in its sphere to your acts which are internationally unlawful, and its members will protect themselves against your violation of their legal rights."

Concession agreements are as vital to the functioning of the international economy as they are to the national economy. International law has recognized this fact in rules which harmonize the reasonable interest of the national sovereign with those of the international society. Concession agreements are not vulnerable to the unilateral exercise of sovereign power destroying the fabric of public and private rights which they create.⁶¹

⁶¹ A third article by the author on this topic is expected to be published, under the title "Nationalism, Nationalization and International Law," in the *Revue de Droit International pour le Moyen-Orient* (1958).

NEW LIGHT ON THE BELIZE DISPUTE

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I

British Honduras, or Belize, has a diplomatic history at once notable and obscure. Bordered by the Mexican State of Quintana Roo, the Republic of Guatemala and the Caribbean Sea, this British Colony has an area of 8,598 square miles and is thus a little larger than Wales or Massachusetts. An international pawn since the seventeenth century, British Honduras has been the subject of a dispute between Great Britain and Guatemala since 1859, in which year they made a treaty defining its southern and western boundaries. It was officially made a British colony in 1862, a Crown colony in 1870, and was released from administrative subordination to Jamaica in 1884. Guatemala challenged the British title to it intermittently and futilely during this period. Several decades of diplomatic indecision followed. The Guatemalan challenge was renewed in earnest in 1931, and the controversy became heated after 1936. In 1940, deferring to British preoccupation, President Jorge Ubico set the issue aside for the duration of the second World War. In September, 1945, Guatemala announced reactivation of the question, and the late 1940's saw another spirited exchange of views.

This desultory Anglo-Guatemalan dispute over British Honduras continues,¹ and its mere existence creates an awkwardness in trans-Atlantic relations. That the dispute remains unresolved is due ostensibly to the failure of Great Britain and Guatemala to agree on a jurisdictional question. Both nations have said the International Court of Justice might decide the dispute. Great Britain accepted the Court's jurisdiction over the matter as a legal question in 1946. Guatemala has insisted, however, that any decision on this question must be *ex aequo et bono*. Neither government has seen fit to change its view.²

¹ For a recent expression of Guatemala's policy of "revindication" see C. Castillo Armas, "Informe del Presidente de la República Coronel Carlos Castillo Armas al organismo legislativo al inaugurarse sus sesiones ordinarias," in *El Guatemalteco* (Guatemala), No. 73, March 4, 1957, pp. 980-981; also see Guatemala, Ministerio de Relaciones Exteriores, Decreto No. 511, *ibid.*, No. 29, Jan. 6, 1956, p. 1, which created the Consejo Nacional de Belice, a planning, study, and consulting body to deal with the problems of regaining Belize.

² W. H. Gallienne to C. Hall Lloreda, Guatemala, Oct. 26, 1948, in *Diario de Centroamérica*, sección informativa, No. 76, Oct. 30, 1948, discusses the British viewpoint; Hall Lloreda to Gallienne, Guatemala, Oct. 29, 1948, *ibid.*, No. 77, Nov. 2, 1948, gives Guatemala's objection to a strictly legal decision; for a sketchy, running account of the affair since 1948 see *Hispanic American Report* (Stanford, 1948—).

If the dispute should be finally committed to the Court's decision—whether for an equitable or for a strictly legal decision—there are certain questions which must be answered. In 1946, during the postwar recommencement of the controversy, Josef L. Kunz thoroughly delineated these questions. Kunz, referring to the Anglo-Guatemalan treaty of 1859, said:

The first problem the Court will have to decide is the character of this treaty and the meaning of its Art. 7; this necessitates the interpretation of the treaty.³

Such an interpretation should take into consideration the treaty's negotiation and the negotiation and lapse of its additional convention of 1863. There has been published no adequate account of those negotiations. The Guatemalan Government has published important documentary information in its *White Book* (1938) and a plethora of legal and other opinions in the supplements thereto, and has sponsored numerous monographs on the subject. On the other side, the *British and Foreign State Papers, 1859-1860* (1867) contain a considerable body of correspondence bearing directly on the negotiation of the 1859 treaty. Further, the noted British historian, R. A. Humphreys, has written for *International Affairs* (1948) an outstanding interpretation of the dispute. This last, however, obviously was designed to redress the balance of Guatemalan propaganda.⁴

These publications do not give sufficient attention to a group of documents both pertinent and available: the records of the British Foreign Office. This material provides a virtually complete picture of the British side of the negotiations, and interesting insight into the Guatemalan side. The object here is to bring these documents to notice and through them to assess the character of the 1859 Treaty.⁵ It should be remembered that the treaty constitutes just one of several elements in the case. Its interpretation will shed light primarily on the question of cession, rather than on the issue of title by occupation. Accounts of the dispute from its beginnings in the colonial period exist in abundance, but here we need to consider only such historical background as is required to understand the question of cession.

Simplified, the history of Belize during the era of the Spanish Empire in America tells of the occupation of a deserted stretch of coast on the Gulf of Honduras by English pirates and logwood-cutters. According to Spanish law this territory, north of the River Sibún, belonged to the Captaincy General of Yucatan, which was in turn an integral part of the Viceroyalty of New Spain. The area south of the Sibún belonged to the Captaincy General of Guatemala. Eventually this meant that all Spanish title to the area above the Sibún was claimed by Mexico and that below

³ J. L. Kunz, "Guatemala vs. Great Britain: in re Belice," 40 A.J.I.L. 383-390 (1946). His footnotes provide a rather thorough bibliography of the dispute through 1946.

⁴ See Kunz for detailed citation of the Guatemalan publications; 50 *British and Foreign State Papers* 126-237 (1867); R. A. Humphreys, "The Anglo-Guatemalan Dispute," 24 *International Affairs* 387-404 (1948). ○

⁵ Clearly Humphreys has utilized these materials, but without citation.

it by Guatemala, since these nations were respectively the successor states of the Viceroyalty of New Spain and the Captaincy General of Guatemala. From 1763 to 1814 Great Britain and Spain signed a number of treaties enumerating certain concessionary rights to the British at Belize. According to these instruments Spanish title remained unchallenged through 1786. From them it may be presumed that title remained with Spain even after 1815.⁶

Great Britain sought to retain possession of her Central American holdings after the Spanish American nations became independent in the early 1820's. But she still did not claim formal sovereignty. Recognition of British rights in Belize was gained from Mexico in 1826, but neither the Central American Federation nor its successor state, Guatemala, would extend such recognition. Mexican recognition gave Great Britain a title only as far south as the Sibún, but British occupation extended to the Sarstún. Thus Great Britain met the United States in the hectic diplomatic contest over isthmian rights with the southern and western boundaries of Belize undefined.

The 1850 Clayton-Bulwer Treaty, which provided for joint British-United States control of any interoceanic canal developed by them on the Isthmus, prohibited either nation from maintaining dominions in "Central America." The treaty was thus deliberately vague. "Central America" could be a geographic description of the Isthmus or could refer to the defunct Federation so named. However, the declarations by Secretary John Clayton and Minister Henry Bulwer at the exchange of ratifications made it clear that the treaty did not apply to British settlements around Belize. At the same time Clayton stipulated that the rights of no Central American state were compromised by the treaty or by any part of the negotiations. This left Great Britain in firm possession of British Honduras within the limits to which it had legal title before April 19, 1850, the date of the signing of the Clayton-Bulwer Treaty. She still needed to offset Guatemalan rights to the area south of the Sibún. One way to accomplish this was by treaty. A memorandum by Foreign Office counsel, upon which the instructions for negotiating this treaty were based, indicates the British need and solution:

The point . . . which Great Britain has to establish against the Republics which possess the former territories of Spain in that quarter is, how the British right of occupation or usufruct under the [Anglo-Spanish] Treaties of 1783 and 1786 has become converted into a right of sovereignty. We maintain that the Treaties of 1783 and 1786 were abrogated by the subsequent war between Great Britain and Spain; that during the war the boundaries of the Settlement of Honduras were enlarged; and that when peace was reestablished, no Treaty of a political nature or relating to territorial limits, revived those Treaties between Great Britain and Spain which existed previously.⁷

⁶ A convincing and scholarly general treatment of Belize during the Spanish colonial period is J. A. Calderón Quijano, *Belice, 1663(?)–1821, historia de los establecimientos británicos del Río Yalis hasta la independencia de Hispanoamérica* (Sevilla, 1944).

⁷ J. B. Bergne, "Memorandum on Draft Treaty with Guatemala relative to the Boundary of British Honduras," Foreign Office, Jan. 14, 1859, Public Records Office,

The memorandum subsequently assesses the inherent weakness of this position:

It does not seem clear at what time the extension of the British occupation from the Sibun to the Sarstoon took place. The nature of the claim of Great Britain necessarily implies that it was during the war with Spain.

The United States was contending that the British expansion took place largely after the 1809 treaty of alliance between Great Britain and Spain and—being encroachment rather than true conquest—was illegal. The British memorandum admits that if the expansion did indeed take place after 1809 “the argument founded on conquest and on the abrogation of old treaties by the War, would be impaired.”⁸

The Foreign Office had then a rather restricted field of maneuver. On the one hand, its legal claims to title between the Sibún and the Sarstún rivers were definitely questionable as against those of Guatemala. On the other hand, a political agreement which would clearly convey title by cession from Guatemala was forbidden by the Clayton-Bulwer Treaty and the jealously watchful United States Government. The British Minister to Central America, Charles Lennox Wyke, was made cognizant of these limiting circumstances, and was named plenipotentiary to negotiate a treaty with Guatemala. It was signed on April 30, 1859, in Guatemala City, and the ratifications were exchanged there the following autumn.

This treaty had two distinct parts. The first six articles—which dealt with the definition, survey, and administration of the Guatemala-British Honduras boundary—had been dictated by the British Government. They provided that the boundary should extend from the mouth of the Sarstún up that river to Gracias a Dios Falls, thence north to Garbutt's Falls on the Belize River, and from that point due north to the Mexican border. Each state was to appoint a boundary commissioner within a year. An umpire and a detailed procedure for arbitrating intra-commission disputes were also provided. Each government was to pay the expenses of its commissioner and of his party. Navigable waterways which formed portions of the boundary were to be open and free to navigation by both parties. The eighth article provided for ratification within six months.

Article 7 of the treaty had a distinctly different purpose and origin than the others. By proposing its addition on his own authority, Wyke obtained Guatemala's assent to the entire treaty draft sent out by the Foreign Office. This controversial seventh article states:

With the object of practically carrying out the views set forth in the preamble of the present convention for improving and perpetuating the friendly relations which at present so happily exist between the two High Contracting Parties, they mutually agree conjointly to use

Foreign Office Section 15, Vol. 114, folios 1-12 (cited hereinafter as FO followed by the appropriate section/volume, and folio number), Microfilm, Bancroft Library, University of California, Berkeley. In this paper, citation of outgoing Foreign Office correspondence is to draft copies.

⁸ *Ibid.*

their best efforts, by taking adequate means for establishing the easiest communication (either by means of a cartroad or employing the rivers, or both united, according to the opinion of the surveying engineers) between the fittest place on the Atlantic coast, near the settlement of Belize and the capital of Guatemala, whereby the commerce of England on the one hand, and the material prosperity of the Republic on the other, cannot fail to be sensibly increased, at the same time that the limits of the two countries being now clearly defined, all further encroachments by either party on the territory of the other will be effectually checked and prevented for the future.⁹

It would be difficult to imagine a more imprecise agreement. But Wyke and Pedro de Aycinena, Guatemalan Foreign Minister, had a verbal understanding which was supposed to supply the required precision without the disadvantage of publicity.

II

Guatemalans have long claimed that they ceded certain territory, or at the very least all their rights to that territory, to Britain in the Treaty of 1859. Article 7 was put in the treaty, they say, to compensate them for that cession. It was worded vaguely that it might not openly violate the Clayton-Bulwer Treaty's prohibition of British expansion in "Central America." The British have replied that it was, as plainly stated therein, a convention to define boundary limits between areas over which sovereignty was already generally determined. Further, the disputed Article 7, as its text states, was a measure presumed to benefit both parties, and was perfectly explicable in its own terms. To decide which interpretation is the more accurate, it is obviously desirable to know, insofar as possible, what representatives of the two governments thought about the treaty at the time of its negotiation.

The Foreign Office instructions to Wyke, and the memorandum on which they were based, state plainly that he was

not to accept any part of the proposed boundary as a cession from the Republic of Guatemala, or to accept, as it were, a Title to any part of the British occupation from the Republic.

Particular concern was expressed about the area between the Sibún and the Sarstún. Manifestly, the Clayton-Bulwer Treaty was the reason for avoiding any appearance of a cession. Thence came the British conception of a boundary line previously existing, but not yet ascertained. The language of these instructions indicates rather clearly that Britain expected Guatemala to claim legal right to the area below the Sibún.¹⁰

Wyke, a man whose knowledge of Guatemalan affairs was much respected in the Foreign Office, believed refusal to admit a cession would constitute "the great difficulty" in obtaining a boundary agreement. Guatemala,

⁹ The text of this instrument has been frequently published and may be found, together with various preliminary drafts, in FO 15/114.

¹⁰ Earl of Malmesbury to C. L. Wyke, Foreign Office, Feb. 16, 1859, FO 15/114, ff. 18-19.

averse of the extra-legal nature of British occupation of much of the area within the desired boundary, would demand an indemnity for quitting her claims to it. Wyke saw the inconvenience of violating the Clayton-Bulwer Treaty but, if he were to be certain of gaining the desired boundary, could not promise to avoid a cession. Indeed, he saw the probable necessity of a covert agreement to that effect.¹¹ The day the treaty was signed, April 30 1859, Wyke confirmed his prediction: settlement on a basis other than compensated cession had been refused. The Guatemalan position remained unshaken because, said Wyke,

in point of fact we have no legal right beyond that of actual possession, to the tract of country between the Rivers Sibun and Sarstun which formerly belonged to the Ancient Kingdom of Guatemala.¹²

Thus, departing from instructions, Wyke had proposed Article 7 as a single solution to the many-sided problem. His immediate explanation of this solution is of course basic to any correct interpretation of its intended effect. A key sentence in his original dispatch reiterates that British claims below the Sibun were weak. This statement's importance is heightened by the fact that the British official published version of it (1867) was altered textually to support the British claims:

ORIGINAL

As we are rapidly losing the carrying Trade of this Republic which the American Steamers on the Pacific and the Panama Railway are depriving us of, it becomes of course important if possible to turn the course of Trade again into its old Channels, and when by so doing we could at the same time *succeed in acquiring a good and legal Title to Our Settlement of Belize, the want of which at present forms our weakest point in the whole Central American question*, it appeared to me, I should be justified in somewhat exceeding my Instructions if by so doing I could bring about so positive a good.¹³

PUBLISHED

As we are rapidly losing the carrying trade of this Republic, which the American steamers on the Pacific and the Panama Railway are depriving us of, it becomes, of course, important, if possible, to turn the course of trade again into its old channels; and when, by so doing, we could, at the same time, *establish the limits of our settlements of Bel'ze*, it appeared to me I should be justified in somewhat exceeding my instructions if, by so doing, I could bring about so positive a good.¹⁴

¹¹ Wyke to Malmesbury, Guatemala, March 31, 1859, FO 15/106, ff. 94-97.

¹² Wyke to Malmesbury, Guatemala, April 30, 1859, FO 15/114, ff. 45-49.

¹³ *Ibid.* Italics added.

¹⁴ British and Foreign State Papers, 1859-1860, pp. 243-244. This version of the dispatch omits more than three paragraphs of the original, paragraphs which tended to contradict the Foreign Office argument. At least one other dispatch from Wyke (Feb. 7, 1860) and one from Consul W. Hall (Jan. 28, 1860), published in this volume, have similar deletions.

The Foreign Office relayed Wyke's dispatch and the treaty to the Colonial Office (the department responsible for British Honduras). In a rather offhand reply, the Colonial Secretary said he was "aware of no reason" why it should not be ratified. The Legation in Guatemala was instructed to exchange ratifications and to express to the Government of Guatemala the British Government's "high satisfaction" with the treaty. Specific and complete approval was given to Article 7.¹⁵

After formal ratification by the Guatemalan Executive in September, 1859, the treaty faced yet another political test in that country. The President's Council of State had voted to ratify by the narrow margin of three votes, after which elements of opposition in the country became so vociferous in denouncing the treaty, that the Government felt only a unanimous Congressional vote of approval could squelch their criticism. Failure to obtain a large majority might destroy the treaty's effectiveness. Opposition was strengthened during that autumn by public evidence of the Cabinet discord over it, and for that reason the Government urged that Great Britain at once commence surveys for the road projected in Article 7. This would provide demonstrable proof of her good faith. The opposition had duly publicized that the article depended on such good faith. They maintained that Guatemala had ceded for a worthless promise a large tract over which it had always claimed sovereignty.¹⁶

In December, 1859, the Foreign Office appointed Henry Wray, Captain of Engineers, to carry out the survey. In its almost cheerful acceptance of the cost of this survey the British Government carefully asserted that Guatemala should pay for the road's actual construction. Great Britain's proper rôle was to be one of scientific guidance. Lacking exact knowledge of its obligations under the treaty, the Foreign Office carefully avoided unnecessary commitments and instructed its representatives to do likewise. Its caution was heightened by opposition to the treaty in the Colonial Office.¹⁷

The extensive nature of the British financial commitment to the road was probably first revealed in London by a dispatch from Hall written on January 28, 1860. Opposition in the Guatemalan Congress had taken the Constitutional ground that the Executive had no warrant for making a treaty whose tendency was to cede any portion of the territory always considered as belonging to Guatemala. Thus Hall temporarily withheld the Foreign Office assertion that Guatemala was to pay all construction costs. Its revelation, he said, probably would have resulted in the Congress "throwing out" the treaty. The Guatemalan Government had always believed that Article 7 meant the two governments would conjointly build the road,

¹⁵ Malmesbury to W. Hall, Foreign Office, June 30, 1859, FO 15/114, ff. 74-75.

¹⁶ Four dispatches from British representatives in Guatemala to Lord J. Russell in 1859, all in FO 15/114, depict this situation: from Hall, Sept. 17, ff. 78-79; from Hall, Sept. 30, ff. 90-91; from Wyke, Oct. 19, ff. 93-96; and from Wyke, Oct. 22, ff. 119-120.

¹⁷ Russell to Hall, Foreign Office, Dec. 15, 1859, FO 15/114, ff. 137-141.

as it was privately arranged and understood between the Guatemalan Government and Mr. Wyke, but which it was not deemed necessary or expedient to insert in the Convention.¹⁸

Hall threw considerable light on the current situation, but Wyke's dispatch from Nicaragua on February 7, 1860, spoke with more authority on the treaty itself. He stated in more detail why he had proposed Article 7 and what he understood it to mean. Certain correspondence from the Colonial Office had given a "plain meaning" interpretation to the treaty which would restrict the British commitment. Commented Wyke: "it is impossible to help smiling at the naïveté of this declaration. . . ." He recounted again his understanding that Great Britain had long sought to obtain a legal title to the area between the Sibún and Sarstún, first from Spain and then from Guatemala, and how this had been prevented in recent years by the Clayton-Bulwer Treaty. In negotiating for the title, said Wyke, "I should have *utterly failed*, had it not been for this very road-making stipulation. . . ." He concluded that, on signing the treaty, both parties had understood that Great Britain would furnish scientific direction Guatemala the materials, and that the two countries would share equally in paying the laborers.¹⁹

After legislative ratification was obtained, Hall communicated to the Guatemalan Cabinet the British opinion that Guatemala should bear construction costs. The Guatemalan Cabinet, holding news of the British attitude in strictest secrecy, rushed a courier to Wyke, who was in Nicaragua. Wyke became alarmed lest revelation of the British attitude endanger the treaty. If it should leak out of the Cabinet, he said, "the Opposition will succeed in . . . repudiating our Convention for defining the Boundaries . . . of Belize."²⁰ That such a situation could develop under the dictatorship of President Rafael Carrera, epitome of the Latin American *caudillo*, is indicative of the widespread public clamor against the British treaty.²¹ Wyke's analysis of the Guatemalan political system may be questioned, but it contains basic evidence of the meaning attached to the treaty at the time of its ratification. In sum, he testified that Guatemala, government and people, believed their claims to certain ancient rights were given up by it. To them Article 7 was unquestionably the compensation for that cession. The destruction of this belief would mean their repudiation of the treaty.

III

The Palmerston Cabinet in the spring of 1860 knew it was deeply committed by the Guatemala treaty. Three years more were spent determining just how deeply. The return of Wyke to London provided complete information upon the negotiatory commitment. But data upon which to

¹⁸ Hall to Russell, Guatemala, Jan. 28, 1860, FO 15/114, ff. 203-208.

¹⁹ Wyke to Russell, Managua, Feb. 7, 1860, FO 15/114, ff. 211-217.

²⁰ *Ibid.*, T. 218-222.

²¹ Hall to Russell, Guatemala, April 30, 1860, FO 15/114, ff. 263-265.

make an exact calculation of the government's obligations, necessary before requesting a Parliamentary appropriation, awaited completion of the road survey. Captain Wray forwarded his report on the survey from Belize in early January, 1861.²² It indicated that a usable road would cost about £145,465.10 or half again as much as Wyke and Aycinena had calculated. Also it argued that in the long run the proposed road might injure what remained of Belize's trade, if indeed it had any effect at all. Wray's report made the already "onerous" obligations of the treaty appear still more unsatisfactory, and was the basis for a brisk exchange of memoranda within the Cabinet during March and early April.

When the Foreign Secretary, Lord Russell, asked for opinion on the treaty, the first reply came from the Duke of Newcastle, Secretary for the Colonies. His sharply worded note placed all responsibility upon the Foreign Office. Reasoning *a priori* that Parliamentary approval would be difficult to obtain, he considered ways and means of shedding British obligations toward the road project:

If the Treaty were considered not worth the price at which it seems we are now called to purchase it, might it not, without any violation of good faith, be represented to the Guatemalan Government that the "understanding" between the Plenipotentiaries having been adopted in ignorance of the facts and the survey having proved that the 7th Article is almost impracticable the Convention must be foregone unless Guatemala would accept it without the Article?

If however Guatemala really estimates this Article so highly—even at the cost of £72,000 as her share for the Road—and insists upon its retention, then I think, with the almost certainty that we have that Guatemala neither can nor will pay her share and that our money will be spent for an undertaking which can never be completed, we might fairly demand that before the work is commenced each Country shall deposit its share in the hands of some third party. The result would no doubt be that Guatemala would never pay and the road would not be made.²³

Palmerston forwarded his reflections, less contentious in tone, about three weeks later:

It may well be doubted whether Parliament would vote so large a sum for making a Road in the Territory of another State and which could not be shown to be of great and direct advantage to a British Territory. I suppose it would be said that the agreement to contribute to the Road was the Price paid for the new Boundary. If so we could hardly keep the Boundary and not contribute to the Road.²⁴

At this point in the discussion Wyke formally recorded his view of the affair in a series of three memoranda filed at the Foreign Office. In the first he defended his cost estimate as against that of the survey commissioner, whom he described as a "superficial observer." Concluding,

²² Captain H. Wray to Russell, Belize, Jan. 6, 1861, FO 15/115, ff. 1-43; a printed version follows, *ibid.*, ff. 43-67.

²³ Duke of Newcastle, Memorandum, London, March 6, 1861, FO 15/115, ff. 206-209.

²⁴ Viscount H. J. T. Palmerston, Memorandum, London, March 26, 1861, FO 15/115, ff. 210-211.

he reiterated that the treaty had gained for England title to the area between the Sibún and Sarstún, and "the final adjustment of the whole Central American Question."²⁵

In the second memorandum he defended the limits established by the treaty for British Honduras against recent criticism from timber-cutting concerns in the colony. He noted that those limits had in fact been laid down originally by a former Superintendent of Belize after consultation with the "best informed" elements of the colony.

It appears also, that all grants of land South of the River Sibún were made subject to the condition that if any part of that territory should hereafter to be ceded to those having a rightful claim to it, the holders of such grants were not to consider themselves entitled to compensation for any losses that might accrue to them thereby.²⁶

The last memorandum recorded his understanding with Aycinena:

In order to avoid any misunderstanding after my departure from England, as to the roadmaking article to the Treaty of April 30, 1859 I think it better to place on record for the sake of future reference if necessary, what passed verbally . . . between us that both governments should cooperate in carrying out this work as follows: viz.: England was to furnish all required for its scientific direction & practical operation in all matters, that is to say skill [sic] labour, therewith concerned, defraying the expense of the same, whilst Guatemala was to provide all the materials which the Country produced for the construction of the Road, and as many labourers as were necessary for carrying it out, the wages of the latter being defrayed equally by both governments. . . . At the time the Treaty was signed, Don Pedro and myself estimated the expense of thus constructing the road at £80,000, or at most £100,000.²⁷

This last mentioned estimate was the basis for Wyke's opinion that the British Government could not be held liable for more than £50,000. Also, in this memorandum, he again explained that Article 7 was deliberately vague to prevent the United States Government from

asserting that by this clause we had bribed that of Guatemala to cede their right to the 500 leagues of Territory to which we gained a legal title by this Convention.

Reading the memoranda of Newcastle and Wyke, the Secretary of the Exchequer, William Gladstone, did not see that the Government had yet reached a position from which it could take positive action. Nor did he take a flattering view of Wyke's handiwork. It seemed preposterous that the Treasury was to pay out money on the basis of an unwritten understanding and the "virtually unintelligible" Article 7:

It is useless to look back on this extraordinary affair, or to ask in what form it can be made tolerable to Parliament, which has been unconstitutionally bound, so far as Government can bind it, to pay public money without its consent.²⁸

²⁵ Wyke, Memorandum [No. 1], Foreign Office, March 28, 1861, FO 15/115, ff. 188-190.

²⁶ *Ibid.*, [No. 2], March 29, 1861, ff. 192-193.

²⁷ *Ibid.*, [No. 3], March 29, 1861, ff. 194-195.

²⁸ W. Gladstone, Memorandum, April 3, 1861, FO 15/115, ff. 200-202.

This note appears to have furnished the impetus leading to the additional convention of 1863. The day following Gladstone's memorandum, Russell ordered Wray home from Central America for consultation.

Partly as a result of those consultations during the summer of 1861, Russell informed the Colonial Office in September, with reference to the Treaty of 1859, that he believed it "inadvisable and most impolitic to cancel that treaty."²⁹ Two months later the new British Minister in Guatemala City was instructed to obtain the Guatemalan Government's opinion upon the next step in the road project. Russell admonished, however, that "the views of the Guatemalan Government must be expressed with precision and in detail."³⁰ It was suggested that an additional definitive convention would be the most desirable means to that end. The Foreign Office now awaited concrete proposals from Guatemala. They were not forthcoming.

Weary of Guatemalan delay, the British proposed an additional convention in December, 1862. Aside from the expenses of the chief engineer and his staff, the British were to pay £25,000 of construction costs. Guatemala was to match the amount and to pay any costs beyond the £50,000 thus deposited. Asserting once more that Guatemala must receive the adequate compensation provided by Article 7 before giving up its rights in Belize, Aycinena declined the proposal. The British share would have to be much greater.³¹

Negotiations were now transferred to London where Juan de Francisco Martín represented Guatemala. After he presented to the British a lengthy memorandum detailing the Guatemalan view, the Foreign Office appointed Wyke to represent it in the negotiations. Guatemala's specific counter-proposal to the British was that the latter pay up to £60,757 instead of £25,000. Guatemala appeared ready to accept the rest of Great Britain's previous draft.³² The British Cabinet decided that a compromise figure of £50,000 would be acceptable under certain conditions. Agreement was reached, details worked out, and the instrument signed in two weeks. The convention required ratification within six months, but Guatemala did not ratify in that time. In the spring of 1864 Martín requested that Russell allow Guatemala an additional year to consider ratification. Russell refused, saying the treaty "falls to the ground" because of Guatemala's non-compliance with the time stipulation.³³

Correspondence upon the matter fell off until May, 1866, when Martín

²⁹ Russell to Newcastle, Foreign Office, Sept. 14, 1861, FO 15/143, ff. 167-168.

³⁰ Russell to G. Mathew, Foreign Office, Nov. 26, 1861, FO 15/143, ff. 201-207.

³¹ Russell to Mathew, Foreign Office, Dec. 15, 1862, FO 15/143, ff. 275-277, contains the British proposal; P. de Aycinena to Mathew, Guatemala, Feb. 10, 1862, FO 15/144A, ff. 39-47, is the unfavorable Guatemalan reply.

³² Juan de Francisco Martín, "Memorandum on Convention with Guatemala for the Construction of the Road to the Atlantic," London, May 18, 1863, FO 15/144A, ff. 58-65; the Guatemalan counter-proposal, forwarded with the memorandum, is found on ff. 89-91.

³³ Wyke to Russell, Foreign Office, Aug. 6, 1863, FO 15/144A, ff. 137-138, gives notice of the signing; the text is in *ibid.*, ff. 143-156.

informed the Foreign Office that Guatemala had at last ratified the convention of 1863. He asked that Great Britain now ratify it. The new British Ministry's view of the Guatemala treaty was quite distinct from that of the Palmerston Cabinet of 1863. Though restrictive in its interpretation, the earlier ministry had shown a desire to discharge the obligations assumed under the treaty. Under Lord Clarendon and later under Lord Stanley (who came to office in the summer of 1866) the Foreign Office demonstrated a wish first to reconsider those obligations, and then to dismiss them.³⁴

Mexico was at that time publishing claims to Belize. This fact and others detracted from the apparent value of the Guatemalan treaty. At any rate, the Treasury agreed that the additional convention was not worth its price and should be dropped.³⁵ The Colonial Office also questioned the value of the treaty, but was concerned about the continuance of the obligation under Article 7 in the original treaty. In this regard Lord Carnarvon observed that

on the lapse of this second Convention the original agreement revives, and that, if the matter proceeds further, the only question will be whether a fixed payment now of £50,000 by installments, or under the conditions provided, is a more convenient arrangement than a possible indefinite payment of £72,500 at a later period.

He did not press this observation, however.³⁶

Thus advised, Stanley notified Martín on July 30, 1866, that the British Government would not ratify the convention. His refusal was based on the "simple ground" that the convention's lapse had been caused by Guatemalan delay and that Great Britain had been thereby released. Within the month Martín asked that a new agreement, identical with the lapsed convention, be made.³⁷ Demonstrating rather clearly the change of British position from an inclination to discharge the treaty to a desire that it be dismissed, Stanley asked in reply if "it would not be better to abandon the road project by mutual consent." If Guatemala did not agree to thus end the matter, it was incumbent on her "to suggest a method of proceeding" which would be at once economical, equitably shared, and commercially profitable. In the course of his note, Stanley made the explicit admission that the question remained open.³⁸

Martín grasped the opportunity to continue negotiation, but vigorously denied the basic change of conditions claimed by Stanley.³⁹ In December 1866, he opened a climactic exchange of notes, painting in minute detail the legal consequences of non-fulfillment of Article 7. Again he brought

³⁴ Lord Clarendon to Treasury, Foreign Office, May 18, 1866, FO 15/143, ff. 124-126.

³⁵ Treasury to Clarendon, London, June 13, 1866, FO 15/145, ff. 140-141.

³⁶ F. Rogers to Sir E. Hammond, London, July 19, 1866, FO 15/145, ff. 153-161.

³⁷ Lord Stanley to Francisco Martín, Foreign Office, July 30, 1866, FO 15/145, ff. 162-165.

³⁸ Francisco Martín to Stanley, Paris, Aug. 14, 1866, FO 15/145, ff. 166-169.

³⁹ Stanley to Francisco Martín, Foreign Office, Aug. 29, 1866, FO 15/145, ff. 174-178.

⁴⁰ Francisco Martín to Stanley, Paris, Sept. 13, 1866, FO 15/145, ff. 180-185.

forward the Guatemalan view that this article was the *sine qua non* of Guatemala's acceptance of the rest of the treaty. It was agreed to, in all its vagueness, as a friendly act by which to aid Great Britain in its difficulties with the United States. Thus Article 7 was "a real compensation in decorous form" for Guatemalan rights in Belize.⁴¹ Stanley categorically denied this:

Her Majesty's Government never admitted the existence of any such territorial rights on the part of the Republic of Guatemala. They conceived that it would be for the advantage of both Parties, of Guatemala no less than for Great Britain with a view to prevent disputes and encroachment on either side, that the boundary between the respective territories should be defined; but in the view of Her Majesty's Government that boundary had always existed since the expulsion of Spain, though it had never been defined. Her Majesty's Government did not accept, and never would have accepted, the definition of the boundary as involving any cession, or as conferring any title, on the part of Guatemala; nor is there a syllable in the convention which can lead to such a conclusion.⁴²

Continuing, he made his oft-cited assertion that Great Britain was released from the obligations of Article 7 because of Guatemalan failure to ratify the additional convention:

Her Majesty's Government maintain, that by signing the Convention of 1863 and being ready to ratify it in 1864, at the time appointed for that purpose, they have done all that was incumbent upon them to fulfill the engagement of the Convention of 1859, and are now released from the obligations of the latter Convention by the conduct of the Guatemalan government itself.⁴³

Yet, after a further lecture on the binding nature and finality of the time stipulation, Stanley indicated unwillingness to rest his case entirely upon it. He admitted that release from Article 7 based on the limitations of the six-month ratification period "may perhaps be considered as in some measure arising out of a question of form." The rôle of Parliament, he said, placed other obstacles of "a weighty and substantial nature" in the way of any new convention. "The engagement of the Convention of 1863 was that Her Majesty's Government would not absolutely pay, but recommend to Parliament to enable them to pay Fifty Thousand Pounds to the Government of Guatemala in the manner therein provided." Since the Government was dependent on appropriations by Parliament, it was useless to sign such a convention unless there was hope of that body's approval. In 1863 there was such hope. In 1864, when Martín asked Russell for a year's extension for ratification, the likelihood of an appropriation was doubtful. "It is quite certain in the opinion of Her Majesty's Government that the House of Commons would not sanction it in 1867."⁴⁴

In rebuttal, Martín saw a "perfect discordance" between Stanley's

⁴¹ Francisco Martín to Stanley, Paris, Dec. 21, 1866, FO 15/145, ff. 304-308.

⁴² Stanley to Francisco Martín, Foreign Office, Jan. 3, 1867, FO 15/146, ff. 1-9.

⁴³ *Ibid.*

⁴⁴ *Ibid.*

two notes—those of August 29, 1866, and January 3, 1867. The first indicated that the question remained open for discussion, the second stated unequivocally that it was closed.⁴⁵ This British decision to close the question must have been the cause of a worried Foreign Office memorandum by Sir Edward Hammond, the Permanent Under Secretary of State:

I do not very much like this Guatemala road business. If we absolutely set aside the 7th Article of the Convention of 1859, the Guatemala government may contend, and I think with justice that the whole convention falls with it.⁴⁶

The intention to close the matter was confirmed, however, by Stanley's famous annotation that "Mr. Hammond's profound concern simply delays a decision; but I do not see that we have anything else to do."

During 1867 Guatemala tried on several occasions to reopen the matter but met with consistent refusal. After a lapse of more than a year and a half, Martín tried again in 1869. The Government of Guatemala by that time contracted a loan in England which would guarantee their share of the road project.⁴⁷ Wyke, who was now at a European post, was notified of the new effort. He wrote the Foreign Office advising wholly in terms of expediency, that the matter remain closed. Wyke believed Stanley's dispatch of August 29, 1866, had weakened an otherwise impregnable British position.

His commentary was in cynical contrast to the statements recorded by him during the 1859-1863 negotiations. He now said:

The reason the Guatemala government left the Wyke & Martin Convention so long unratified, was because they had not £50,000 at their command with which to pay their share of the Contract, which stipulated that that sum should be paid by them at the same time we paid ours. This I foresaw all along would be the case, & therefore there never was any real probability of our being called upon to pay such a sum.⁴⁸

The Foreign Office saw the question in a similar light and informed the Guatemalan representative in November, 1869, that there was not the "smallest expectation" that the question would be reopened.⁴⁹

Thus, as the 1860's ended, the British Government considered the question of the Guatemalan cart-road terminated. The Guatemalans seemed determined, as they ever had been, to gain compensation for the boundary agreed to in 1859. To them the question remained very much in contention. The ensuing years, and particularly the 1880's, 1930's, and 1940's, were to see more correspondence and disputation, but the general outline of the controversy was drawn by 1869. The negotiations of that first decade must be considered in any meaningful interpretation of the Treaty of 1859.

⁴⁵ Francisco Martín to Stanley, Paris, Jan. 26, 1867, FO 15/146, ff. 10-11.

⁴⁶ Hammond, Memorandum, Foreign Office, Sept. 26, 1866, FO 15/145, ff. 207-239.

⁴⁷ Francisco Martín to Clarendon, Paris, Sept. 24, 1869, FO 15/146, ff. 243-252; see also E. Corbett to Clarendon, Guatemala, May 31, 1869, *ibid.*, ff. 233-236, which furnishes insight on this situation.

⁴⁸ Wyke to Bergne, Copenhagen, Sept. 20, 1869, FO 15/146, ff. 239-241.

⁴⁹ Clarendon to E. Palacios, Foreign Office, Nov. 15, 1869, FO 15/146, ff. 303-306.

IV

Clear-cut interpretation of a treaty is frequently impossible. Consider in this connection some of the complicating factors in the negotiation of the treaty of 1859. The British negotiator delayed informing his government of the full meaning of his private, unwritten understanding with the Guatemalan representative. Acting thus in ignorance, the British Government interpreted Article 7 in a way highly offensive to Guatemala. A British representative then withheld this interpretation from Guatemalan ears until the treaty passed an important political test. Even then certain elements of the Guatemalan Government, fearing repudiation of both the treaty and themselves, kept the unfavorable British interpretation a closely guarded secret. In this they were encouraged by the British negotiator.⁵⁰

Nevertheless, certain legal questions can be answered from the documents which have been examined. It is legally possible that if Article 7 was vague and mentioned no cession, it was so written simply because of the strictures of the Clayton-Bulwer Treaty on Great Britain.⁵¹ Statements made by the British and Guatemalan negotiators and expressed in Foreign Office memoranda support this view. The fact, then, that a cession was not mentioned in the text of the treaty is not proof that none was understood to take place. Very much to the point was a British Minister's remark, in reference to this treaty, that if a state were induced to surrender a portion of territory to Great Britain, it could just as easily be induced to declare that the territory had belonged to Great Britain prior to 1850.⁵²

If Article 7 is viewed as compensation for the rest of the treaty, two axioms of interpretation may be said to support the British desire to restrict that compensation: first, "if . . . the meaning of a stipulation is ambiguous, that meaning is to be preferred which is less onerous for the party assuming an obligation";⁵³ or, conversely, "if two meanings of a stipulation are admissible, that which is least to the advantage of the party for whose benefit the stipulation was inserted in the treaty should be preferred."⁵⁴ According to these, British opinion as to the extent of the liability which she incurred would outweigh that of Guatemala.

In the question of cession, however, there is a more strongly worded rule which in the light of the documents examined above unquestionably supports Guatemala:

If two meanings of a stipulation are admissible according to the text of a treaty, such meaning is to prevail as the party proposing the stipulation knew at the time to be the meaning preferred by the party accepting it.⁵⁵

⁵⁰ See above, pp. 286-287.

⁵¹ "Previous treaties between the same parties, and treaties between one of the parties and third parties, may be referred to for the purpose of clearing up the meaning of a stipulation," according to L. Oppenheim, *International Law, A Treatise* (H. Lauterpacht, editor, 7th ed., London, 1953), Vol. I, pp. 859-860.

⁵² E. Cardwell to Stanley, London, Jan. 30, 1866, FO 15/145, ff. 24-28.

⁵³ 1 Oppenheim 859.

⁵⁴ *Ibid.* 860.

⁵⁵ *Ibid.*

Wyke's statements in his acknowledgment of instructions, in his dispatches of April 30, 1859, and February 7, 1860, and in his Foreign Office memoranda of March 28 and 29, 1863, show clearly that throughout the negotiation of these agreements he knew the Guatemalans believed Article 7, which he had proposed, was compensation for the cession of their rights to the area between the Sibún and the Sarstún Rivers. By this correspondence the British Government was certainly made aware of the cession involved, if not of the amount of compensation.

Perhaps more significant of the extent to which the British Government recognized a disguised cession was a memorandum drafted for the Foreign Office by Wyke shortly after the signing of the supplemental convention. It was a defense of the agreements of 1859 and 1863 to be used by the Government's representative in the House of Commons if there was debate upon the necessary appropriation. The debate did not take place but the memorandum shows the grounds which the Cabinet would probably have taken in a Parliamentary defense of the treaty. In the Central American rivalry with the United States, wrote Wyke,

our really weak point was . . . the retaining possession in Belize of territory to which we had no positive right. Under these circumstances it became necessary to obtain such rights from the Government of Guatemala, which however refused to grant it without some indemnification for the concession demanded of them.

He maintained that the road, if completed, would be helpful to Belize but that if it were not finished, Great Britain, according to the convention would have to spend only a fraction of the £50,000 appropriation.

By means of such an outlay we not only avoid all future discussion and differences with the United States on this subject, but we at the same time secure undisputed claim to the whole of the Territory of Belize down to the River Sarstun, thus enabling us to convert a mere "wood cutting Establishment" which it formerly was, into a bona fide Colony and Dependency of the British Crown.⁵⁶

It was thus implied that the cession involved in Article 7 remained incomplete until the Parliamentary appropriation—that is, the consideration—was granted. Later, in his 1869 letter, Wyke may have argued that Guatemalan consent had perfected British title, but he did not repudiate the idea of cession.

Earlier Cabinet memoranda also indicate that the article was viewed as compensation for rights conceded to Great Britain by Guatemala. The Duke of Newcastle, so critical of Article 7, opposed the treaty as being "not worth the price" of that article. On the other hand, Palmerston, who did not disapprove the treaty, also viewed Article 7 as the compensation to Guatemala for boundary rights obtained by Great Britain. Consequently, he believed those rights could not be retained if Great Britain failed to contribute to the road. Gladstone felt simply that Parliament, as far as the

⁵⁶ "Memorandum by Sir Charles Wyke for Mr. Layard's use should any debate take place in the House of Commons relative to the grant of £50,000 demanded for the construction of the Guatemala Road," Foreign Office, n.d., FO 15/144A, ff. 157-161.

Cabinet had the power to bind it, had been bound to pay. Consequently a concrete statement of British liability was required. This need of the Treasury apparently furnished the impetus which led to the Convention of 1863.

That convention was obviously an "authentic interpretation" of Article 7. The British claim it released them from the obligations contracted under Article 7, although it was never ratified—or rather because it was not ratified properly by Guatemala. Their basic argument on this point has apparently changed little since 1869. Yet the records of the Foreign Office contain repeated admissions, by members of the British Government, that this very contention was legally dubious. Even before Stanley cut off further discussion of the matter, Lord Carnarvon, Colonial Secretary, had opined that, if the second convention lapsed, "the original agreement revives." Clearly, he saw no legal release. For that matter, in the letter of August 29, 1866, Stanley betrayed his own position by admitting that "the question remained" and by offering the diplomatic initiative to Guatemala.

From another point of view the British very much desired the treaty of 1859, except Article 7, to remain in force. As noted above, an experienced hand at the Foreign Office expressed fear that if Stanley "absolutely set aside" Article 7, the entire treaty would be abrogated. Then what kind of legal title would Great Britain possess? Stanley's reply, that there was nothing else to do, in no way denied that effect.

In the 1870's there was sporadic activity on the road question. As might be expected, the memoranda and dispatches of this later decade contain many inaccuracies regarding the affair. But to the Foreign Office in the 1870's, just as in the 1860's, Article 7 of the treaty of 1859 appeared as compensation. In 1877 a memorandum prepared for the Foreign Secretary stated that Article 7

was admitted by Her Majesty's Government as affording an indemnification on their part for the occupation by England of a portion of Belize which belonged to Guatemala, and to the occupation of which by us the United States Government raised objections after the failure of the Clayton-Bulwer Treaty.⁵⁷

The following year another memorandum, which pointed out the difficulties of reopening the question, added:

It is only right to say that there appears to be a good deal of foundation for the Guatemalan claim.⁵⁸

Then in 1880 came the mission of the Guatemalan, Crisanto Medina, who made one of the last serious attempts to broach the question in the nineteenth century. In closing the door on Medina, Lord Granville did not depart significantly from Stanley's final position.

⁵⁷ "Memorandum for the use of Lord Derby," Foreign Office, Oct. 26, 1877, FO 15/207, ff. 37-38.

⁵⁸ "Memorandum in reference to General Negrete," Foreign Office, May 10, 1878, FO 15/207, ff. 37-38.

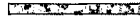
Stanley had not been satisfied with a formalistic basis for British action. From Article 7, that is, the requirement of ratification of the additional appropriation within six months. Thus his argument held that the need for Parliamentary appropriation was an additional reason for the British Government's inability to act, and that Guatemalan delay had made it impossible to obtain that appropriation. This does not appear to be actually a different reason. Rather, it appears to be the sole justification for Great Britain holding rigorously to the six-month requirement. But what kind of justification is it?

Suppose Guatemala had ratified within the six months, and that the British Parliament had then failed to make the necessary appropriation. According to Stanley's argument, which emphasized that the British Government merely contracted to ask Parliament for the appropriation, Great Britain's international obligations toward Guatemala would have been fulfilled. This hardly seems reasonable. If Great Britain had formally refused to pay the obvious compensation provided for in the treaty, any cession therein must have failed. If it is insisted that the mere request for an appropriation constituted compensation, the fact remains that the British Government did not ask for a vote on the matter. It seems only just that if Great Britain held Guatemala to a strict accounting on the six-month clause, Great Britain might in turn be held to strict accountability in a matter so important as actual compensation for rights tendered.

The passage of nearly a century has served to obscure the present effect of the Anglo-Guatemalan Treaty of 1859. But some things about it are not obscure. Evidence provided by its authors and early interpreters indicates that the treaty involved cession of the area between the Sibún and the Sarstún, for which its seventh article provided compensation. Due perhaps to mitigating circumstances, the compensation was never paid. In her legal contentions, Great Britain has relied heavily on the assertion that this treaty was a simple boundary definition which did not involve cession. Such being the case, perhaps Guatemala should reconsider her refusal to accept a purely legal decision of the Belize dispute. Similarly, too, British contentions in the future should abide by Lord Russell's 1865 admonition: "The less said about this treaty the better."¹⁹

¹⁹ Russell, May, 1865, annotation of an information copy of a note from P. Campbell Scarlett (British Minister to Mexico) to J. F. Ramírez (Mexican Minister of Foreign Affairs), Mexico, March 20, 1865, FO 15/144A, ff. 287-292. Russell's comment, p. 289, approves Scarlett's interpretation of the 1859 treaty as extending the boundary of British Honduras from the Sibún to the Sarstún.

EDITORIAL COMMENT



CLYDE EAGLETON

MAY 13, 1891—JANUARY 29, 1958

In the passing of this distinguished scholar and teacher the American Society of International Law has suffered a grievous loss. The AMERICAN JOURNAL OF INTERNATIONAL LAW has lost from its editorial board one of its ablest members. From the ranks of professors and publicists in the field of international law he will be sorely missed.

Born in Texas the son of a professor at a pioneer college of the Southwest, Clyde Eagleton studied at that institution (Austin College), and later obtained the Master of Arts degree at Princeton. Subsequently he became a Rhodes Scholar and, after completing his work at Oxford, returned to teach in the United States. He prepared his dissertation for the doctorate at Columbia University under the supervision of Professor Charles Cheney Hyde.

As a teacher, he was connected with several institutions in the early years of his career, including Daniel Baker College, the University of Louisville, and Southern Methodist University. In 1923 he became a member of the faculty of New York University, and with this institution he was to be connected for more than a third of a century. It was there that he came to be known both nationally and internationally as an outstanding scholar, a teacher and friend of many students at this metropolitan university, and a tireless advocate of a law-ordered world. He was at various times a visiting professor at other universities, including the University of Texas, Stanford, the University of Chicago, and Yale University. He lectured at the *Académie de Droit International* in 1950. At New York University he was Professor of International Law, Director (after 1948) of Graduate Program Studies in United Nations and World Affairs, and, beginning in 1951, Director of the Institute for the Study of International Law.

He did not limit his efforts to mere analyses of world events and of problems in international law, but was a courageous advocate of what he believed was necessary in order to bring about a more peaceful world. His professional connections in the international field were many. They included membership on the editorial board of the *American Political Science Review*, association (as international law editor) with the *New York University Law Quarterly Review*, collaboration with the *Revue de Droit International et de Législation Comparée*, and membership for more than twenty years on the editorial board of the AMERICAN JOURNAL OF INTERNATIONAL LAW, to which he was elected in 1937. He was especially active with the International Law Association, and in the latter years of his life

was President of its American Branch. In this capacity he had, in the months just before his death, been greatly occupied with plans for the International Law Association Conference which is to be held at New York City in September of 1958.

His work also included public service. At times he was a consultant to governments in international law cases. Over the period from 1922 to 1945 he served in the United States Department of State. He was a technical expert with the American Delegation at the Dumbarton Oaks Conference in 1944, and served as assistant secretary at the Conference. He was also a technical expert with the United States Delegation to the Washington meeting of the Committee of Jurists in 1945, and in the same year adviser to the United States Delegation at the San Francisco Conference. Although he was apparently disappointed in some of the features of the United Nations Charter, he worked valiantly to promote the interests of the new world organization. He was at times a consultant to United Nations bodies.

Clyde Eagleton's published work is impressive. His first book, *The Responsibility of States in International Law*, is a widely used reference work. The third edition of his text entitled *International Government* appeared in 1957.¹ His *Analysis of the Problem of War* appeared in 1937, and *The Forces That Shape Our Future* in 1945. He was co-editor of seven volumes of the *Annual Review of United Nations Affairs*, published by the New York University Press. In addition to these, he enriched the literature of international law through articles and editorials in the *AMERICAN JOURNAL OF INTERNATIONAL LAW* and through his contributions to other American and foreign journals.

When Clyde Eagleton, after thirty-three years as a faculty member at New York University, retired from his active professorship in 1956 and became Research Professor Emeritus of International Law, he did not consider that his work was done. At the time of his death he had begun at New York University what was to have been a three-year study of the uses of international rivers. His warm, friendly personality, his scholarly qualities, and his devotion to the task of promoting international law and organization, will cause him to be remembered with affection and appreciation by those who seek, in the words of the stated purpose of the American Society of International Law, "to foster the study of international law and to promote the establishment and maintenance of international relations on the basis of law and justice." Clyde Eagleton's belief in the possibility of achieving the conditions which he envisioned, and in his own country's ability to act toward these goals, is perhaps best expressed toward the close of his volume on *The Forces That Shape Our Future*:

... Marvelous opportunities are these, such as the world has never seen before; opportunities for healthy and comfortable living for all, for political freedom and economic security for all, for human happiness through innumerable new methods and machines. If the

¹ Reviewed below, p. 378.

achievement of these things sounds impossible, we have often done the impossible! The frontiers of the world are before us—social and spiritual, as well as political and material frontiers.

. . . my confidence in American ability is unlimited. If we can rise above our inertia and prejudices, if we choose to pursue sincerely the possibilities that our vision now opens to us, the American people can lead the whole world toward a realization of the hope for humanity. . . .

ROBERT R. WILSON

THE SECRETARY GENERAL ON THE RÔLE OF THE UNITED NATIONS

When the League of Nations came into force on January 10, 1920, it was received with enthusiasm and hope by victors, vanquished and neutrals. It was the first great experiment of its kind and the first decade of its functioning was relatively successful. But after 1930, it began rapidly to decline and after 1940 existed only on paper, disappearing legally in 1946. With the decline of its fortune came indifference, sarcasm and even hostility. As early as 1935 the Venezuelan international lawyer, Planas-Suárez,¹ wrote a strong anti-League of Nations book as a "Warning to America" and stated: "*La Sociedad de las Naciones es un cadáver—y nada más.*" The "failure of the League" became a slogan. And yet it was not the League that had failed, but its Members.

This "failure of the League" was also strongly in the minds of those who, at the San Francisco Conference of 1945, drafted the Charter of the United Nations. The wish was to create a new quasi-universal international organization, far stronger than the League. Hence, complete prohibition of the "use or threat of force in international relations" (with significant loopholes, it is true), collective security and international sanctions named as the primary goal, great programs of international protection of human rights, power to command and enforce for the Security Council; but all that on the basis of "sovereign equality of all the Members" and non-intervention in matters "which are essentially within the domestic jurisdiction of any State." The makers of the Charter—which is very badly done from the point of view of legal technique—erroneously believed that the strength of a legal order is exclusively determined by the clauses of its constitution, and hoped, unrealistically, that the alliance of the "Big Three" would continue in peace.

The United Nations was perhaps at first officially "oversold" to the public, and highly unfavorable world political conditions in which the United Nations had to operate from the beginning, the cold war, the paralysis of the Security Council, the many failures and frustrations, have brought a part of the general public from early enthusiasm to deep disillusionment. Even the scholars were divided. On the right, there were the ultra-conservatives, opposed to any international organization of this type and longing for a return to "classic" international law. They were matched, on the left, by the "wishful thinkers." Still more to the left,

* ¹ Simón Planas-Suárez, *La Política Europea y la Sociedad de las Naciones. Una Advertencia a la América* (Barcelona, 1935, 534 pp.).

there are the world government utopians. On the extreme right there are the "neo-realists." If the utopians want to do away with international law in order to replace it by "world law," the municipal law of a world federal state, the neo-realists want to do away with international law completely, as being a mere fabric of abstractions, a sheer illusion; they proudly concentrate on "power."

The great events of 1956—Suez, Hungary—have brought about a very critical attitude in Europe with regard to the United Nations, particularly in the United Kingdom, and more so in France. Attacks against the voting system, the increasingly large Afro-Asian bloc, the "double morality" of United Nations resolutions, and the wisdom of prohibiting the use of force without international enforcement of the law, are common.

In the present international situation of intensified "cold war," a well-balanced appraisal of the nature and the rôle of the United Nations, equidistant from utopia and from abysmal pessimism, is obviously very much needed. Such a balanced appraisal has recently been given by Secretary General Dag Hammarskjöld.² The Secretary General of the United Nations has a more enhanced legal position than the Secretary General of the League of Nations.³ He is not only the chief administrative officer of the United Nations, but, under Article 99, also has a right of political initiative. The importance of the Secretary General has in recent years very much increased.⁴ Dag Hammarskjöld's rôle as a diplomatic negotiator could already be seen in his mission to Peiping in 1954 and to the Middle East in 1956. But in the Suez crisis of 1956 his position was truly dominating. He had to take responsibility for creating the U.N. Emergency Force (UNEF) in a surprisingly short time, to give orders and instructions to this force, to carry on negotiations with the Members contributing forces to UNEF, to propose financial arrangements, to act as Chairman of the Advisory Committee, to negotiate with Israel, to negotiate with Egypt as to the deployment of UNEF, and to take care of the problems of the Gaza Strip and the Gulf of Aquaba. He had to make quick reports to the General Assembly and make proposals and give legal interpretations. He was responsible for bringing about compliance with the resolutions of the General Assembly concerning the evacuation of foreign troops from Egypt. He had to take care of the compliance with the old Armistice Agreement between Israel and the Arab States. At the same time he organized and directed successfully the clearing of the Suez Canal. He was often given very wide discretion. For a time the United States was satisfied, in its foreign policy concerning this region, to approve, support and sometimes to accept in advance the decisions and legal opinions of the Secretary General. However, while Secretary

² Introduction to Annual Report on the Work of the United Nations (reprinted in the New York Times, Sept. 5, 1957, pp. 10-11).

³ Josef L. Kunz, "The Legal Position of the Secretary General of the United Nations," 40 A.J.I.L. 786-792 (1946).

⁴ Elmore Jackson, "The Developing Rôle of the Secretary General," 11 International Organization 431-457 (1957).

General Trygve Lie, through his dutiful behavior in the Korea earned the implacable hostility of the Soviet Union, Secretary Dag Hammarskjöld was unanimously re-elected by the Security and the General Assembly. The strong initiative, the cool Swedish objectivity, the enormous capacity for work, the high diplomatic and strictly legal attitude—in a word, the great talent and achievement of the Secretary General—entitle his opinion on the present rôle of the Nations to the greatest respect.⁵

In order to assess the rôle of the United Nations correctly—and yet constructively—it is, first of all, necessary to recognize the Nations clearly for what it is, both in fact and in law. It is, standing many differences in detail, essentially a second League of Nations, namely, a loose organization of sovereign states as it corresponds to the Occidental idea of international organization.⁶ In any such international organization success depends, in the last analysis, on the benevolence and good will of the sovereign Members. To this congenital weakness must be added the facts of the present crisis and transformations, of the divided world, of the renaissance of Asia and of the awakening of the East and of the coming of the atomic age. All that is reflected by the increasing membership in the United Nations. But, as the Secretary General states, these conditions are not created by the United Nations and they would be worse without the United Nations. The League is a mirror of the present world situation. But, asks Lester B. Brown, would it be wise to break the mirror, because we do not like the world which it reflects?

Owing to its constitutional limitations and to present world conditions the United Nations cannot enforce the law upon nations great and small. There is no doubt that the emphasis on "collective security" and on sanctions is played down. It seems that the Korean action is not to become a precedent, but will rather remain an isolated instance. As in the Korean action one could neither speak of a decision of the Security Council—there was only a legally non-binding recommendation—nor of a true United Nations action with United Nations forces. If the Secretary General hit the "wishful thinkers," others are against the world government utopians. For it is stated that the conditions under the United Nations constitution are not only unavoidable but that far-reaching changes are at this time politically impossible. Today politically impossible to transform the United Nations into an authority enforcing the law upon nations. As the Secretary General strongly emphasizes, these weaknesses and limitations "do not derive from the provisions of the Charter, but from facts of international life which are not likely to be by-passed by a different approach or surmountable attempts at merely constitutional reforms." He is, therefore, opposed to a revision of the Charter at this time.

⁵ A very similar appraisal of the rôle of the U.N. has recently been given by B. Pearson, in *International Relations*, Vol. I, No. 8 (London, October, 1954), pp. 329-338.

⁶ See W. Schiffer, *The Legal Community of Mankind* (New York, 1954).

On the other hand, contrary to the "neo-realists," the Secretary General adheres strictly to the principle of the rule of law. United Nations action must be in accordance with international law and valid agreements. The Secretary General should normally take no position in disputes between Members, but in critical situations he must act as the "agent of the principles of the Charter." He stated in the Suez crisis that "it cannot be admitted that the *status juris* may be changed by the use of force." At the same time he states the law of the Charter correctly: Only the Security Council has the power to order the use of force, and that only with the concurrent vote of the permanent members, and only to maintain or restore international peace and security. The General Assembly may recommend, investigate, pronounce judgment, but it does not have the power to compel compliance with its recommendations." The Secretary General states clearly and correctly that the "Uniting for Peace" Resolution did not involve a transfer of the power of the Security Council. All the General Assembly can do under Article 51⁷ is to recommend economic sanctions and military aid to the victim of an armed attack, but the decision rests with the governments of the Members. The majority action in the two crises of 1956 was in conformity with the Charter's political recommendations. There was compliance in the Suez case, but not compliance in the Hungarian case. In neither case were sanctions ever proposed, for resolutions of the General Assembly are not legally binding. It is in the same spirit of legality that the Secretary General ruled that the deployment of UNEF, created by a resolution of the Assembly, on the territory of a Member needs the consent of that Member; consent was given by Egypt, but not by Israel.

The strong feeling for the rule of law can be seen in the Secretary General's regret at the decline of acceptance of the Optional Clause of compulsory jurisdiction and at infrequent recourse to the International Court of Justice. The Secretary General feels that the United Nations has a good record in the Suez crisis. UNEF, basically different from the United Nations force created under Article 41, has, in spite of its "incomplete presence, temporary duration and limited authority," made a successful contribution, and studies relating to the creation of a "Permanent United Nations Peace Force" are under way.⁸

The United Nations is by no means a super-state and cannot act outside the framework of decisions by its Member governments. Progress toward solutions of problems depends on governments. The United Nations can help, but it cannot and should not attempt to surmount difficulties alone. But—and that is the new thing—states alone cannot do it either. The Secretary General sees an abuse in the use of the United Nations for mere propaganda or for purposes of national power politics. Nations or groups of nations "will never be able to arrogate justice."

⁷ This correct construction was made from the beginning by Professor A. V. DICEY.

⁸ See article by Louis B. Sohn, above, p. 229. Somewhat different was the "U.N. Guard," proposed by Secretary General Trygve Lie in 1949, as a small police force to protect U.N. missions in the field in troubled areas.

unto themselves in international affairs in ways which once were a matter of course." Hence, he holds that alliances, maintained side by side with the United Nations, have only a limited value. So-called "voting victories" are likely to be illusory in a loose organization of sovereign Members. The General Assembly is by no means a parliament, but a diplomatic body, consisting of delegates, appointed and instructed by governments, and representing the policies of their states. The Secretary General defends the principle of "one state—one vote," which recently has been under sharp attack, because it corresponds to the principle of "sovereign equality" and because no system of "weighted voting" is at this time politically possible.

The Secretary General recognizes the value of debate and voting and admits the importance of the United Nations as a world forum, where the hopes and fears of nations in all parts of the world may be freely expressed. But he sees a particularly important, perhaps the principal, rôle of the United Nations as an "instrument for negotiations among and, to some extent, for governments, as an instrument for concerting action by governments in support of the Charter." There is, apart from public proceedings, much room for "quiet diplomacy," for a policy of reconciliation, for winning consent to peaceful and just settlement of the problem at issue.

Let us not forget that the second task of the United Nations—international co-operation in many so-called "non-political" fields—is of the greatest importance, too, and that the United Nations, like the League of Nations, is here often far more successful than in the problem of peace. The United Nations already is indispensable, and it would have to be invented, if it did not exist. We must neither exaggerate nor minimize its value and rôle. These are exactly the paradoxes of the present dynamics of history: International organizations are absolutely necessary and, at the same time, their limitations are unavoidable.

JOSEF L. KUNZ

INTERNATIONAL LAW OF OUTER SPACE

While in Geneva recently the undersigned was invited to lecture at the Bologna Center of International Studies maintained by The Johns Hopkins University, on the subject of "International Legal Aspects of the Sputnik." He was somewhat taken aback by such a suggestion and immediately consulted three former colleagues at the Graduate Institute of International Studies, all leading authorities in international law, who shall be nameless here. They unanimously replied: "No, don't touch it, leave it alone, we don't know enough about it yet." Lacking much time for further investigation at the moment, he decided to beg off from this assignment, except for a few words preliminary to a discussion of another topic.

The distinguished international jurists, all of them familiar figures at The Hague, were largely right but partly wrong, however, as will shortly appear. In due time the writer explored the materials available in this field in the library of the United Nations and the library of the Graduate

but little, and it was found that a certain amount of material was available in this field. He had been advised to seek out above all others the writings of one Andrew G. Haley and, although not finding such writings in Geneva, he has been richly provided by Mr. Haley with these materials since returning to Washington.¹ All of this experience is recounted here because it is believed to throw light on the present situation with respect to the international law relating to outer space and its study and development today and tomorrow.

By "outer space" is meant, of course, space outside the range of "aircraft" or balloon flight, say, above thirty miles in elevation. This phrase was discussed very suggestively by Dr. Fenwick in the January number of the JOURNAL.² The problem of distances or dimensions still requires further attention, however.

To return for a moment to the literature of the subject, the names of John Gold, Cooper, Wolf Heinrich, C. Wilfred Jenks, Alex Meyer, Ming-Ming Peng, and Oscar Schachter should be mentioned in addition to Mr. Haley.³ The extended discussion in the 50th annual meeting of the Society in 1956, turning upon a paper delivered by Mr. Cooper, must be given special mention.⁴ A volume on *Law of the Space Age*, written by Mr. Haley, is to be published by the Public Affairs Press in Washington in the near future.

The purely physical aspects of this problem cannot be disregarded. Here, as in other situations (territorial waters), the functions of the physical scientist and the lawyer are inextricably intertwined. This would be particularly true if the whole series of rockets, manned rockets, satellites, and manned satellites, were to be taken into account. Some disposition to claim priority for the physicists is in evidence in certain utterances;⁵ the lawyers do not appear to be so bold; perhaps they are afflicted with a more or less justified inferiority feeling.

From the legal point of view the problem obviously divides itself mainly into two categories: *de lege lata* and *de lege ferenda*. A certain amount, although a limited amount, of historic or customary international law, relating especially to jurisdiction, may be applied here. On the other hand, the greater, or at least the newer and more far-reaching, elements of the problem must be dealt with by new legislation. Various proposals have been put forward looking in this direction, both unofficial-scientific and governmental. In the first group fall the suggestions of the technicians mentioned above (Cooper, Haley, Jenks and others).⁶ In the second

¹ See especially Mr. Haley's paper, "Space Law—The Development of Jurisdictional Concepts," read before the Eighth Annual Congress of the International Astronautical Federation at Barcelona in October, 1957 (published by the American Rocket Society, New York), footnote 1, and papers there cited.

² 52 A.J.I.L. 96 (1958).

³ See citations in footnotes and quotations in text of Mr. Haley's "Space Law and Jurisdiction—Jurisdiction Defined," in 24 Journal of Air Law and Commerce 286 (1957).

⁴ Proceedings of the American Society of International Law, 1956, pp. 84-115.

⁵ Mr. Cooper, *ibid.*, p. 85.

⁶ Cooper and Haley as already cited; Jenks and others as quoted in paper cited above, note 3, pp. 289-296.

group fall the proposals and counter-proposals and negotiations of the United States and Soviet Russia.⁷

Reference was just made to the question of jurisdiction, which might seem to be the primary legal problem involved, together with the basic issue of the right of a state to traverse, with any vehicles or objects, the outer space above subjacent states. There is some disposition to maintain the jurisdiction of the latter out indefinitely into space; there is an opposite school which would apply the old concept of free navigation to outer space.⁸ The familiar problem of enforcement then arises: Could a state enforce any jurisdiction accorded to it in outer space and how?

There arises also a problem of torts, to borrow a term familiar in other contexts. If a missile or satellite sent up by one state should land in another state and do damage, would the former state not be liable *ex aequo et bono*, if on no other basis, for reparations? Here much depends on whether the missile or satellite could come down intact and do damage or would disintegrate in descending.⁹

Two comments must be made in conclusion. Obviously little or no progress can be made along any of these lines without new legislation or at least much skillful adaptation of old law. On the other hand, it is going to be terribly difficult to secure international agreement—for this is what "international legislation" means in the present state of international institutions—on these subjects. Along with these pessimistic observations, believed to be thoroughly justified in view of all the circumstances, may be placed another incontrovertible proposition: The problem cannot be escaped and must be solved. International lawyers and state representatives are confronted with a supreme challenge.¹⁰

PITMAN B. POTTER

⁷ See, for example, the New York Times, Feb. 1, 1958, p. 1, col. 1, and Feb. 3, 1958, p. 1, col. 6; also, regarding possible United Nations action, *ibid.*, Feb. 1, p. 6, col. 8; and Soviet proposal for U.N. action on outer space and U. S. reaction, *ibid.*, March 16, 1958, p. 1, cols. 6 and 8.

⁸ See John C. Cooper, "Roman Law and the Maxim *Cujus Est Solum* in International Air Law," 1 McGill Law Journal 23 (1952).

⁹ See mention of this problem in Proceedings, cited above, pp. 107-108.

¹⁰ See also John C. Cooper, "Flight-Space and the Satellites," address before British Branch of the International Law Association, Nov. 27, 1957, at the Institute of Advanced Legal Studies, London University; 7 Int. & Comp. Law Q. (1958); and *idem*, "Missiles and Satellites: Law and Policy," address before the Regional Meeting of the American Bar Association, Atlanta, Ga., Feb. 22, 1958.

NOTES AND COMMENTS

FIFTY-SECOND ANNUAL MEETING OF THE SOCIETY
APRIL 24-26, 1958

THE STATLER-HILTON, WASHINGTON, D. C.

PROGRAM

International Law and the Political Process

THURSDAY, APRIL 24, 1958

9:00 a.m.—Ohio Room

Meeting of Executive Council

1:00 p.m.—South American Room

Registration for members

2:00 p.m.—South American Room

The National Decision-Making Process and International Law

Chairman: Hardy C. Dillard, *University of Virginia Law School; Vice President of the Society*

SPEAKERS:

John L. Howell, *East Carolina College*: "Grassroots International Law"

Walter S. Surrey, *of the D.C. Bar*

Comments: Charles G. Fenwick, *Director, Department of International Law, Organization of American States*

Claude S. Phillips, Jr., *Western Michigan University*

7:00 p.m.—South American Room

Registration for members

8:15 p.m.—South American Room

Address by Robert R. Wilson, *President of the Society*

Address by His Excellency Sir Leslie Munro, K.C.M.G., K.C.V.O., *Ambassador of New Zealand; President, United Nations General Assembly*:
"Recent Developments in the Role of the General Assembly in the Maintenance of Peace"

FRIDAY, APRIL 25, 1958

10:00 a.m.

Some Current Issues of U. S. Public Policy and International Law**South American Room****Panel No. I: *Return of Enemy-Owned Property***Chairman: Otto C. Sommerich, *of the New York Bar*Panelists: Kenneth S. Carlston, *University of Illinois Law School*Victor C. Folsom, *of the New York Bar*William Harvey Reeves, *of the New York Bar*Robert B. Ely, III, *of the Pennsylvania Bar***Pan American Room****Panel No. II: *Foreign Public Entities as Litigants in U. S. Courts***Chairman: Brunson MacChesney, *Northwestern University Law School*

Panelists:

Donald E. Claudy, *of the D. C. Bar*: "The Tate Letter and the National City Bank Case: Implications"Alona E. Evans, *Wellesley College*: "Should Sovereign Immunity Be Governed by Reciprocity?"Ralph G. Jones, *University of Arkansas*: "Who Should Decide on Sovereign Immunity?"Alice Ehrenfeld, *Office of Legal Affairs, United Nations***Congressional Room****Panel No. III: *The Interhandel Case***Chairman: Charles E. Martin, *University of Washington*Speaker: Malcolm S. Mason, *of the New York Bar*Comments: Rosalind Branning, *University of Pittsburgh*Herbert W. Briggs, *Cornell University; Vice President of the Society*

2:00 p.m.

Conflicting National Policies and Some Current International Legal Problems**South American Room****Panel No. IV: *Legal Problems and the Political Situation in the Polar Areas***Chairman: Robert D. Hayton, *Hunter College*

Speakers:

Oscar Svarlien, *University of Florida*: "The Legal Status of the Arctic"John Hanessian, Jr., *U. S. National Committee, IGY 1957-58, National Academy of Sciences*: "Antarctica: Current National Interests and Legal Realities"

Comments: Commander Paul W. Frazier, U.S.N., *Chief of Staff to Rear Admiral George J. Dufek, U. S. Antarctic Projects Officer, Executive Office of the President*

Congressional Room

Panel No. V: *Jurisdiction over Members of Armed Forces Serving on Foreign Territory*

Chairman: Robert W. Tucker, *Johns Hopkins University*

Speaker: Richard R. Baxter, *Harvard University Law School*: "Jurisdiction over Visiting Forces and the Development of International Law"

Comments: Vincent Evans, *Legal Adviser, United Kingdom Delegation to the United Nations*

Monroe Leigh, *Assistant General Counsel (International Affairs), Department of Defense*

Rev. Joseph M. Snee, S.J., *Georgetown University Law Center*

Fritz C. Menne, *First Secretary and Legal Adviser, Embassy of the Federal Republic of Germany*

Pan American Room

Panel No. VI: *Some Legal Problems of International Private Enterprise*

Chairman: Eric Stein, *University of Michigan Law School*

Panelists: The Honorable James W. Fulton, *Committee on Foreign Affairs, United States House of Representatives*

Jorge Hazera, *Alternate Representative of Costa Rica on the Council of the Organization of American States*

Norman M. Littell, *of the D. C. Bar*

Charles O. Galvin, *Southern Methodist University Law School*

5:30 p.m.—South American Room

Informal Reception for Officers and Members of the Society and Their Guests

8:15 p.m.—South American Room

Recent Technological Developments: Political and Legal Implications for the International Community

Chairman: Myres S. McDougal, *Yale University Law School*; *Vice President of the Society*

Speakers:

Eugène Pépin, *Director, Institute of International Air Law, McGill University*: "Space Penetration"

Bernhard G. Beehoeffler, *of the D. C. Bar*: "Control of Weapons"

Comments: Oliver J. Lissitzyn, *Columbia University*

Oscar Schachter, *Director, General Legal Division, United Nations*

SATURDAY, APRIL 26, 1958

10:00 a.m.—Congressional Room

BUSINESS MEETING

7:00 p.m.—Federal Room

ANNUAL DINNER

Presiding: The President of the Society

Addresses: The Honorable Loftus E. Becker, *Legal Adviser, Department of State*

The Honorable Charles S. Rhyne, *President, American Bar Association*

HAGUE ACADEMY OF INTERNATIONAL LAW

29th Session

The 29th session of the Hague Academy of International Law will be held from July 7 to August 23, 1958, with lectures scheduled for every morning from Monday to Friday, and a few scheduled for the afternoon. The session is divided into two periods, the first beginning on July 7 and ending on July 26; the second opening on August 4 and concluding on August 23.

The lectures, which will be given in French or English, with a simultaneous translation given in the alternate language, will cover the general subjects of the principles and historical development of public international law, private international law, international organization, and international tribunals and their case law.

Professor Charles Rousseau, of the Faculty of Law of Paris, will give a general course on principles of public international law. Other speakers on this topic will be Ambassador Francisco García Amador, Professor at the University of Havana, who will treat the subject of "Responsibility of States," a topic of which he is *Rapporteur* on the International Law Commission; Ernest Hamburger, Dean of the Faculty of Law and Political Science of the Free School of High Studies of New York, who will lecture on "Human Rights and International Relations"; and Professor Piero Ziccardi of Milan University, who will discuss "Characteristics of the International Juridical Order."

Under the heading of historical development of international law there will be lectures by Dr. C. J. Chacko, Professor at the University of Delhi, on "India's Contribution to the Field of International Law Concepts"; Dr. A. J. P. Tammes, Professor at Amsterdam University, on "Decisions of International Organs as a Source of International Law"; Professor Paul Guggenheim, of the Law Faculty and Institute of Higher International Studies, Geneva, on "Historical Contribution to the Theory of Contemporary International Public Law"; and Professor Gregory Tunkin, of Moscow University, on "Coexistence and International Law."

The subject of international tribunals and their case law will be discussed by Professor Herbert W. Briggs of Cornell University, Editor-in-Chief of this JOURNAL, who will speak on "Reservations to the Acceptance of Compulsory Jurisdiction of the International Court of Justice."

Under the heading of international organization, lectures will be given by Mr. Fernand Dehousse, President of the Consultative Assembly of the Council of Europe, on "The Integration of Europe"; Mr. Jacob Rolinson, former Legal Adviser to the Israeli Delegation to the United Nations, on "The Metamorphoses of the United Nations"; and Professor G. L. Bassani, of the Faculty of Law of the State University of Milan, on "New Tendencies in International Collaboration and Organization."

A general course on private international law will be given by Professor B. A. Wortley of the Faculty of Law of the University of Manchester. Other lecturers on this subject will be Mr. Plinio Bolla, former President of the Swiss Federal Tribunal, who will speak on "Problems of Copyright"; Professor Walter Schätzel of Bonn University, who will discuss "Persona Names in International Law"; and Professor L. Fredericq, Honorary Rector of the University of Ghent and Professor at the University of Brussels, who will lecture on "Sale in Private International Law."

Admission to the courses is obtained by presenting a Certificate of Identity. Applications for such certificates should be made to the Secretariat of the Academy, The Peace Palace, The Hague. There is no tuition charged for the courses, but a registration fee of ten florins is required. Further information regarding the session may be obtained from the Secretariat.

The Academy offers a certain number of scholarships of 300 guilders each, which are awarded by its Administrative Council. Applications for such scholarships should be made by the applicant himself and be submitted by him directly to the Secretariat of the Academy with a statement of his full name, place and date of birth, nationality, profession, qualifications, and evidence in support of his candidacy. Every application should be accompanied by copies of any scientific publications by the candidate and must be accompanied by a written recommendation of a professor of international law. Applications for scholarships must reach the Secretariat by April 1, and should clearly state the teaching period for which the candidate wishes to be registered.

A number of governments and government agencies, as well as educational institutions and private foundations of many countries also provide scholarships or subventions for attendance at the Academy sessions.¹

Center of Studies and Research in International Law and International Relations

The Center, which was opened and held its first session last year,² will be in session from August 25 to October 5, 1958. A limited number of participants will be admitted to the Center, which is reserved for a select

¹ See 50 A.J.I.L. 429 (1956).

² See 51 *ibid.* 102 (1957).

group of mature scholars with special qualifications, who will work under the guidance of two Directors of Studies.

Information concerning admission to the Center may be obtained from the Secretariat.

ELEANOR H. FINCH

THE COLOGNE CONFERENCE OF THE INTERNATIONAL BAR ASSOCIATION

The Seventh Conference of the International Bar Association will be held in Cologne, Germany, July 21-26, 1958, at the invitation of the *Deutscher Anwaltverein* (German Bar Association). Assisting in the organization and arrangements for the Conference will be the *Kölner Anwaltverein* (Cologne Bar Association).

The International Bar Association is a federation of the national bar associations of thirty-five countries, with approximately six hundred individual members of the legal profession from all parts of the world affiliated as Patrons.

The following topics will be discussed at Cologne on the basis of papers prepared by individual members of the various national bar associations:

1. International Problems of Tort Liability and Financial Protection Arising out of the Use of Atomic Energy. (*Rapporteur* and American Bar Association author: Dean E. Blythe Stason of the University of Michigan.)
2. The American Close Corporation and its Equivalent, and the Status of Wholly-Owned Subsidiaries in Other Countries. (*Rapporteur*: Maître Philippe Gastambide of France; ABA author: Willard P. Scott, Esq., of New York.)
3. Monopolies and Restrictive Trade Practices. (*Rapporteur*: R. O. Wilberforce, Q. C., United Kingdom; ABA author: Edward F. Howrey, Esq., of Washington, D. C.)
4. The Legal Profession:
 - (a) Insurance Protection against Any and All Types of Lawsuits—the Propriety and Legality. (Chairman of the Committee: Ilmo. Sr. D. Roberto Reyes Morales of Spain; ABA member: G. A. Whitehead, Jr., Esq., of New York; Consular Law Society Member: Theodore R. Kupferman, Esq., of New York.)
 - (b) Qualifications to Practice Law in the Foreign and International Field. (Chairman of the Committee: Sr. Manuel G. Escobedo of Mexico; ABA Committee Member: John J. Goldberg, Esq., of San Francisco.)
 - (c) Consideration of the Various Plans for Providing Retirement Income for Members of the Legal Profession. (Chairman of the Committee: Dr. H. M. Voetelink of The Netherlands; ABA Committee Member: John R. Nicholson, Esq., of Chicago.)
5. Administration of Foreign Estates. (Chairman: Dr. Jur. Bernt Hjejle of Denmark; Vice Chairman: Høyesterettsadvokat Ole Thorleif Røed of Norway; ABA Committee Member: Otto C. Sommerich, Esq., of New York.)

6. International Shipbuilding Contracts. (Chairman of the Committee: Høyesterettsadvokat Per Brunsvig of Norway; ABA Committee Member: Alan B. Aldwell, Esq., of San Francisco.)
7. Protection of Investments Abroad in Time of Peace. (Chairman of the Committee: Dr. Kurt Ehlers of Germany; ABA Committee Member: Lowell Wadmond, Esq., of New York.)
8. Legal Aid. (Chairman of the Committee: Sir Sydney Littlewood of the United Kingdom; ABA Committee Member: William H. Avery, Jr., Esq., of Chicago.)
9. International Judicial Co-operation—Bases for Agreement between Civil Law and Common Law Countries. (ABA Chairman of the Committee: Harry LeRoy Jones, Esq., of Washington, D. C. ABA Vice Chairman: Philip W. Amram, Esq., of Washington, D. C.)

A resolution will be acted upon by the General Meeting (the controlling body of the IBA) which was drafted at the Oslo Conference in 1953 by a committee of which Wm. Harvey Reeves of New York was a member, concerning limitations on sovereign immunity of friendly alien sovereigns for commercial dealings with persons and corporations in other countries.

There will also be a meeting at Cologne of the Advisory Committee on Professional Ethics, appointed by member organizations after the adoption at Oslo of the International Code of Ethics for the Legal Profession. Dr. R. Voûte of The Netherlands is Chairman.

The Conference will be held in the Gürzenich in Cologne. The Gürzenich, erected in the 15th century, is one of the outstanding buildings in Cologne. From medieval times, visiting royalty and official guests of the city have been received there. Although badly damaged during the second World War, it has been completely restored and modernized.

It is planned to have simultaneous translations for the Plenary Sessions and other sessions which will be held in the Great Hall of the Gürzenich.

Social Events

Among the social events will be an excursion to the Petersberg, the famous hilltop restaurant overlooking the Rhine, where the *Deutscher Anwaltverein* will give a "Kaffeetafel" (coffee and tea party). The tour will then proceed to Königswinter, and from there by steamer back to Cologne. Other social events include a reception by the Federal Minister of Justice to be held in the Schloss Brühl, a unique example of the high Baroque style. The Mayor of Cologne will receive conferees and guests at a reception in the Walraf-Richartz-Museum. The closing banquet will be held at the Gürzenich.

Officers

The officers of the International Bar Association are Dr. Emil von Sauer (President of the *Deutscher Anwaltverein*, Germany), President; Loyd O. Wright of Los Angeles (Past President of the American Bar Association),

Chairman; Gerald J. McMahon of New York, Secretary General; Sir Thomas Lund (Secretary of The Law Society in England), Treasurer; Rolf Christophersen (Norway) and Heinz Brangsch (Germany), Assistant Secretaries General; Paul B. DeWitt (Executive Secretary of the Association of the Bar of the City of New York), Assistant Treasurer; and one Vice President from each member organization. Conference arrangements in Cologne are under the direction of Dr. Walter Oppenhoff, President, and Dr. Herbert Glaub, Secretary, of the *Kölner Anwaltverein*.

Further information may be obtained from Gerald J. McMahon, Secretary General of the International Bar Association, 501 Fifth Avenue, New York 17, N. Y.

GERALD J. McMAHON

THE INTER-PARLIAMENTARY UNION IN LATIN AMERICA

On July 24, 1958, the President of the United States of Brazil, Mr. Juscelino Kubitschek, will inaugurate in Rio de Janeiro the 47th Conference of the Inter-Parliamentary Union.

This organization, which has a long record and tradition of service in the cause of democracy and peace, will thus hold for the first time in its history an annual plenary session in Latin America. On this occasion, leading representatives of the fifty-two legislatures now actively associated with the Union's programme of mutual exchange and cooperation will assemble in the Brazilian capital where they will sit in the House of Parliament.

In accepting the generous invitation, made by the Brazilian Group, the Council of the IPU was moved by a desire to expand the organization's activities in an area where, up to the present, they have not fully taken root.

While at the governmental level the twenty republics occupy a prominent place in the United Nations, their elected representatives do not yet exercise within the Inter-Parliamentary Union an influence which corresponds to the increasingly important rôle their countries play in the field of international affairs.

The 47th Conference will provide an opportunity to fill this gap and to establish valuable contacts between parliamentarians of the Western Hemisphere and those from other parts of the world.

Parliaments and Foreign Affairs

In these times of international tension, the value of regular meetings between legislators of different countries is being progressively acknowledged. Parliaments tend more and more to exert a continuous control on the conduct of foreign policy, a field which in the past had remained an almost exclusive prerogative of the executive branch of government. This trend has enhanced the significance of the Union which has lately gained many new members in Asia, in the Middle East and in Africa, thus moving towards universality of membership, which is one of its traditional objectives.

Experience has shown that by meeting in their individual capacities and in an atmosphere of complete freedom, parliamentarians can, in certain cases, help to bridge differences existing between their respective countries and pave the way for the conclusion of agreements through the normal processes of diplomacy.

Thus it may be noted that informal conversations held at IPU meetings contributed towards an eventual solution of the Italo-Yugoslav difference on Trieste. Similarly, the first contacts of a political nature between Great Britain and Egypt after the Suez crisis occurred during the course of the 16th Conference in London last September.

Initiative taken by the Union can also lead to unified parliamentary action. A good example can be found in the disarmament resolution adopted in 1956 at Bangkok. Since then, parliaments in countries such as Burma, Czechoslovakia, Hungary, Laos and Yugoslavia have passed resolutions based very largely on the principles enunciated therein. This result has been achieved through the initiative of members of Inter-Parliamentary Groups within their respective parliaments.

As the Union now includes parliamentarians representing all shades of political opinion and differing ideologies, it can contribute to the formation of a world parliamentary standpoint on the major problems of the day.

By sponsoring comparative studies on the functioning of parliamentary institutions, the Union can, furthermore, strengthen the latter and help in the improvement of their procedure.

Initial Objectives of the IPU

Since its foundation in 1889 by a small group of British and French parliamentarians, soon to be joined by members of the United States Congress, the Union has constantly endeavored to find means of eliminating war as an instrument of national policy. Up to the time of the foundation of the League of Nations in 1919, which first attempted to set up a system of collective security based on the universal acceptance of certain common juridical principles, the Union concentrated its efforts on the promotion of international arbitration the principles of which were, partly through its influence, progressively adopted by governments. The work of the First Peace Conference at The Hague in 1899, which led to the establishment of a Permanent Court of Arbitration, owed much to the inspiration of the IPU.

Some years later, a five-member delegation from the Union, in an interview with the then President of the United States, Theodore Roosevelt, urged the convening of a second Hague Conference. This actually took place in 1907 and considered a model treaty of arbitration which had been prepared by the Union.

While two world wars temporarily affected the progress of the Union's work, continuity was never broken and the organization kept in being throughout, the personal links between its members being preserved. Both in 1919 and again in 1945, Inter-Parliamentary activities were resumed

immediately upon the termination of hostilities, and the Union took up anew the task of bringing about lasting peace in the world.

Problems of a legal character were consistently given detailed consideration, and successive Inter-Parliamentary Conferences adopted resolutions on the codification of international law, neutrality, unequal treaties and the limits to state sovereignty.

In a yet undeveloped field, that of international penal law, the Union has also done pioneer work. In 1925, the Washington-Ottawa Conference proclaimed the necessity of repressing acts of aggression which might be committed by States, and laid down the fundamental principles for an international legal code. These principles, which at the time seemed very bold, were incorporated a few years later in the resolutions and acts of the Disarmament Conference concerning collective security and the definition of the aggressor.

These efforts were pursued after the second World War, and, at the Rome Conference in 1948, a Declaration was adopted on the principles of international morality which, in a sense, constituted a charter of the rights and duties of states. This Declaration was complemented in 1955 by a series of resolutions adopted at the Helsinki Conference on the conditions for a true peaceful co-existence between nations.

Rôle and Methods of Inter-Parliamentary Conferences

The Union is composed of National Groups which, according to the Statutes, must be "constituted in Parliaments functioning as such within the territory of which they represent the population, in a State recognized as a subject of international law." The organization has, as a policy-making body, the Inter-Parliamentary Council, which consists of two representatives from each member Group.

In the structure of the organization an essential rôle is played by the annual Inter-Parliamentary Conference, where the attitude of the IPU as a whole is defined on those international problems the solution to which might be found through parliamentary action.

The debates of the annual conference are prepared carefully by Study Committees which some months before draw up the texts of the various draft resolutions to be considered in the plenary session. Thus the Union's decisions are never the result of hurried improvisation and compromise. They are only adopted after full consideration and therefore can be said to reflect a balanced expression of parliamentary opinion in the fifty-two member legislatures.

Seven Standing Study Committees deal with political, juridical, economic, social and humanitarian questions, as well as problems regarding reduction of armaments, intellectual relations and non-self-governing territories. With the exception of the Social Committee, all the others will be convened in Geneva in March with the object of preparing the work for the Rio Conference. Among the questions they will have to study, the following stand out as being of particular importance:

The Reduction of Armaments Committee will examine the problem of atomic weapons and nuclear tests, as well as the possibility of establishing an International Police Force.

At the request of the Brazilian Group, the Economic Committee will discuss a question which is of the greatest importance to all countries of South America, namely, principles governing the investment of foreign capital in countries in process of economic development.

The Committee on Intellectual Relations will consider national and international aspects of freedom of the Press and information.

And, finally, the Political Committee will study the parliamentary cooperation of international organizations.

For all these topics, working papers will be prepared in advance by certain National Groups interested in particular questions, by various international organizations which regularly follow the Union's work and also by the Inter-Parliamentary Bureau itself.

In the light of the final outcome of the work of the Committees, the Inter-Parliamentary Council will establish the final agenda for the 47th Conference.

Before taking up the specific problems before it, the Conference will commence work with a general debate on the basis of a political report presented by the Union's Secretary General. This could be compared to the general debate which takes place at each regular session of the General Assembly of the United Nations, as it provides parliamentarians from all parts of the world with an opportunity of speaking on the evolution of the international situation and of the problems of their own countries.

A special meeting will further be devoted to a statement by Sr. José A. Mora, the Secretary General of the Organization of American States. He will give the delegates an account of the activities and achievements of his Organization.

A New Field of Activity

Following the meetings held during the course of 1955 and 1956 in New Delhi and Bangkok, the Union convened in London in 1957. The Conference was inaugurated by Queen Elizabeth in Westminster Hall, the cradle of British parliamentary tradition, which today still guides legislative assemblies of many countries which have recently gained their independence. Now, in 1958, the Union will, in Brazil, enter a new field of activity.

The organization will be meeting in South America at a time when politics in some of the Republics are disturbed. Democratic forces have, nevertheless, made important gains, and there is evidence of a swing in these countries towards representative government founded on respect for fundamental human rights and free elections.

It is certain, therefore, that a world parliamentary conference held in a country such as Brazil, which has behind it a great political tradition, may have wide repercussions.

It can provide an opportunity for those Latin American politicians who are struggling for the achievement of a democratic way of life adapted to present-day conditions to discuss their problems with parliamentarians from other regions of the world and also to find support and strength in the basic aims and objects of the Union.

Senators and deputies from most Latin American countries have not up to the present been fully brought into the system of conferences, parliamentary visits and exchanges sponsored by the Union. It is to be hoped that 1958 will see them fill their places in the councils organization.

In holding its 47th Conference in Brazil, the Inter-Parliamentary Union wished to make a gesture of friendship towards the peoples of the Americas, knowing full well that they, in equal measure with the peoples of other parts of the world, want to serve the cause of peace and work together for the strengthening of representative government. It invites their parliamentarians to support its work, convinced that any organization which cannot speak for the Americas as a whole does not fully reflect the political situation of today. There can be no doubt that, while the members of the Latin American legislatures would find advantage in participating in the activities of the Union, the latter would also greatly benefit from their co-operation, the leading statesmen of the different republics having always stood for the great principles of democratic humanism and international law.

ANDRÉ DE BLONAY

Secretary General, Inter-Parliamentary Union




ANNUAL PATRONS OF THE SOCIETY

At the meeting of the Executive Council of the American Society of International Law held on November 2, 1957, the Council considered a report of the Committee on Financing and Endowment in which the committee proposed that a new class of contributions to the support of the Society be established in order to increase the capital funds of the Society and add to its income. The committee report pointed out that the capital funds of the Society could be materially increased by soliciting contributions from corporations and other business organizations active in international trade and interested in the problems of international law and its further development. It also pointed out that educational and other institutions, would find it advantageous to support the work of the Society through a new type of contribution. The Executive Council, after full consideration of the question, adopted the following provision, to be added to the regulations of the Society concerning Patrons (Section I, par. 3(a)) :

Upon payment of not less than \$100.00 yearly, any business corporation, partnership, or unincorporated business, or law school or other educational institution, which is not eligible for election to any other class of membership, may be elected an Annual Patron of the Society. Such Annual Patrons shall not be entitled to vote or hold office.

Under present conditions, the necessity for furthering the study and development of international law and promoting the establishment and maintenance of international relations on the basis of law needs no demonstration. It is becoming increasingly evident that the Society should expand its activities in furtherance of such purpose. For this reason, the Executive Council at its meeting last April established a special committee to study the policies and procedures of the Society and to report its findings and recommendations to the Executive Council. That committee, under the chairmanship of Mr. Edgar Turlington, sent a letter and questionnaire under date of February 12, 1958, to members of the Society in the United States asking for comments and suggestions as to ways of increasing the effectiveness of the Society. Obviously, the Society, in order to expand or improve its work, must have the financial means to do so. It is hoped that the adoption of the new provision regarding *Annual Patrons* will bring forth some of the much needed assistance.

ELEANOR H. FINCH



JUDICIAL DECISIONS *

By BRUNSON MACCHESNEY

Of the Board of Editors

INTERHANDEL CASE (SWITZERLAND *v.* UNITED STATES OF AMERICA).

REQUEST BY THE SWISS GOVERNMENT FOR THE INDICATION OF INTERIM MEASURES OF PROTECTION. I.C.J. Reports, 1957, p. 105.

International Court of Justice, Order of October 24, 1957.

In these proceedings for interim relief, the Court ¹ stated in part:

THE COURT,

... having regard to the Application, dated October 1st, 1957, and handed to the Registrar on October 2nd, instituting proceedings by the Swiss Confederation and submitting to the Court a dispute between the Swiss Confederation and the United States of America, in which the Court is asked:

"To adjudge and declare, whether the Government of the United States of America appears or not, after considering the contentions of the Parties,

1. that the Government of the United States of America is under an obligation to restore the assets of the *Société internationale pour participations industrielles et commerciales S.A.* (Interhandel) to that company;
2. In the alternative, that the dispute is one which is fit for submission for judicial settlement, arbitration or conciliation under the conditions which it will be for the Court to determine."

Having regard to the letter dated October 3rd, 1957, and handed to the Registrar on that day, in which the Agent for the Swiss Government, whose appointment had been notified in the Application instituting proceedings, referred to Article 41 of the Statute and Article 61 of the Rules, relating to the indication of provisional measures, and asked the Court:

"pending a final decision in the proceedings instituted by the Application of October 1st, to indicate the following measures:

- (a) The Government of the United States of America is requested to take no legislative, judicial, administrative or executive step to part with the property which is claimed to be Swiss property in the submissions of the Swiss Application of October 1st instituting proceedings, so long as the case concerning this dispute is pending before the International Court of Justice.

* The English and Canadian cases were prepared by Hardy C. Dillard of the Board of Editors.

¹ Vice President Badawi, Acting President; President Hackworth; Judges Guerrero, Basdevant, Winiarski, Zoričić, Klaestad, Read, Armand-Ugon, Kojevnikov, Sir Muhammad Zafrulla Khan, Sir Hersch Lauterpacht, Moreno Quintana, Córdova, Wellington Koo; M. Paul Carry, Judge *ad hoc*.

- (u) In particular, the Government of the United States is requested not to sell the shares of the General Aniline and Film Corporation claimed by the Swiss Federal Government as the property of its nationals, so long as the proceedings in this dispute are pending.
- (v) In general, the Government of the United States should so act that no measure whatever is taken which would prejudice the right of Switzerland to execution of the judgment which the Court will deliver, either on the merits or on the alternative submission."

Makes the following Order:

Whereas the Government of the United States of America was, on October 2nd, 1957, notified by telegram of the filing of the Application instituting proceedings, of which a copy was at the same time transmitted to it by letter; and whereas the submissions set forth in the request for the indication of interim measures of protection were on October 3rd, 1957, communicated to that Government, the text of the request being at the same time transmitted to it by letter;

Whereas the request for the indication of interim measures of protection was notified to the Secretary-General of the United Nations with a reference to Article 41, paragraph 2, of the Statute;

Whereas on October 8th, 1957, the Swiss Government, through the Co-Agent appointed by it, and the Government of the United States of America, through the Secretary of State, were notified that the Court would sit on October 12th, 1957, to hear the observations of the Parties on the request for the indication of interim measures of protection;

Having regard to the letter of October 9th, 1957, by which the Ambassador to the Netherlands of the United States of America notified the appointment by his Government of an Agent and a Co-Agent for the case;

Having regard to the letter of October 10th, 1957, by which the Ambassador to the Netherlands of the United States of America informed the Registrar of the intention of his Government to raise a preliminary objection in connection with the proceedings instituted before the Court by the Government of Switzerland and adding that this objection would be filed in the Registry by the Agents for the United States of America on October 11th in the following terms:

"Preliminary objection of the United States of America:

The Government of the United States of America, through its Co-Agents Loftus Becker and Dallas S. Townsend, herewith files a preliminary objection under Article 62 of the Rules of the Court to the proceedings instituted by the Government of Switzerland in the Interhandel case by its application of October 1, 1957, in so far as that application relates to the sale or other disposition of the shares of General Aniline and Film Corporation now held by the United States Government. The United States Government has determined that such sale or disposition of the shares in the American corporation, title to which is held by the United States Government in the exercise of its sovereign authority, is a matter essentially within its domestic jurisdiction. Accordingly, pursuant to paragraph (b) of the conditions attached to this country's acceptance of the Court's compulsory jurisdiction, dated August 14, 1946, this country respectfully declines, without prejudice to other and further preliminary objections which it may file, to submit the

matter of the sale or disposition of such shares to the jurisdiction of the Court."

Whereas on October 10th, 1957, a copy of the above text was communicated to the Co-Agent for the Swiss Government, and whereas that text was confirmed and signed by the Co-Agents for the Government of the United States of America;

Whereas, the Court not including upon the Bench a Judge of Swiss nationality, the Swiss Government availed itself of the provisions of Article 31, paragraph 2, of the Statute to choose M. Paul Carry, Professor of the Law Faculty of the University of Geneva, to sit as Judge *ad hoc*; and whereas the President of the Court, being a national of one of the Parties to the case, has transferred the Presidency for the present case to the Vice-President in accordance with Article 13, paragraph 1, of the Rules:

Whereas in the course of hearings held on October 12th and 14th, 1957, the Court, in accordance with Article 61, paragraph 8, of the Rules, heard the observations of M. Paul Guggenheim, on behalf of the Swiss Government, and of the Honorable Loftus Becker and the Honorable Dallas S. Townsend, on behalf of the Government of the United States of America;

Whereas by letter of October 16th, 1957, the Ambassador to the Netherlands of the United States of America transmitted the text of the following telegram which had been addressed to him by the Department of Justice of the United States of America:

"Chemie Petition granted. Court invites counsel 'to discuss among other things the power of the District Court to dismiss and the propriety of the dismissal of petitioner's complaint under Rule 37 (B), for failure to obey its order for production of documents issued under Rule 34, in the absence of evidence and of finding that petitioner 'refuses to obey' such order'. Attenhofer and Kaufman petitions denied."

Whereas in the said letter, a copy of which was the same day transmitted to the Co-Agent for the Swiss Government, the Ambassador to the Netherlands of the United States of America expressed the hope that he would be able to amplify this information in due course;

Whereas by letter of October 18th, 1957, from the Swiss Ambassador to the Netherlands, the Co-Agent for the Swiss Government submitted the observation that the communication of the Government of the United States of America in no way affected the conclusions set out under (a), (b) and (c) of the request for the indication of interim measures of protection, which conclusions had been confirmed on behalf of the Swiss Government in the course of the hearings;

Whereas a copy of the letter from the Swiss Ambassador was the same day transmitted to the Agent for the Government of the United States of America;

Whereas by letter of October 19th, 1957, the Ambassador to the Netherlands of the United States of America informed the Registrar that his Government, through its Agent and its Co-Agent, had requested him to transmit the following statement:

"1. At the public sitting of October 12, 1957, Co-Agent Dallas S. Townsend, for the United States of America, stated as follows:

"Chemie unsuccessfully exhausted its appellate remedies to the Supreme Court, and when the six months period of grace had expired, without Chemie making the production, the District Court entered the order and in 1956 held that Chemie's

complaint stood dismissed. Again Chemie appealed unsuccessfully to the Court of Appeals and in this way attempted to get back into the case. The Court of Appeals affirmed and now Chemie, in its second trip to the Supreme Court, is making another effort to get back into the case by petitioning the Supreme Court to review the decision of the Court of Appeals. This petition is now pending before the Supreme Court of the United States." (Verbatim record, page 44).

2. In the afternoon (Washington time) October 14, 1957, many hours after the adjournment on that day of the sitting of this Court at 11.39 a.m., the Supreme Court of the United States of America granted the above-mentioned petition of I.G. Chemie (Interhandel) to review the decision of the Court of Appeals, by issuing the following order:

"Number 348. Société Internationale pour Participations Industrielles et Commerciales, S.A. Brownell. United States Court of Appeals for the District of Columbia circuit. Certiorari granted. Counsel are invited to discuss, among other things, the power of the District Court to dismiss, and the propriety of its dismissal, of petitioner's complaint under rule 37 (B) (2) of F.R.C.P., [Federal Rules of Civil Procedure] for failure to obey its order, for production of documents issued under rule 34 of F.R.C.P. in the absence of evidence and of finding that petitioner 'refuses to obey' such order."

3. The Government of the United States of America wishes to state expressly that it adheres to its preliminary objection, filed October 11, 1957, and to the reasons given in the arguments of its agent and co-agent of October 12 and October 14, 1957, why no interim measures of protection should be issued with respect to the sale or disposition of the shares of General Aniline and Film Corporation. For the information of Court, the Government of the United States of America is not taking action at the present time to fix a time schedule for the sale of such shares."

Whereas a copy of the letter from the Ambassador to the Netherlands of the United States of America was the same day transmitted to the Co-Agent for the Swiss Government;

Whereas by a letter dated October 19th, 1957, and handed in to the Registry on October 20th, the Ambassador of Switzerland to the Netherlands transmitted the following communication from the Co-Agent for the Swiss Government:

"The position of the Swiss Government in regard to this communication is as follows:

1. The Swiss Government takes note of the fact that the Government of the United States has informed the International Court of Justice that it 'is not taking action at the present time to fix a time schedule for the sale of such shares', that is, the shares of the General Aniline and Film Corporation, which, in the opinion of the Swiss Government belong to INTERHANDEL.

2. The effect of this declaration is that the sale of the shares is not imminent, contrary to what the Swiss Government was entitled to assume when, on October 3rd, 1957, it filed its request for interim measures of protection. The Swiss Government would, however, point out that the declaration of the Government of the United States does not indicate for how long the sale of the shares will be suspended. Nor does it indicate that this suspension will be main-

tained so long as the dispute is pending before the Court. The Swiss Government would be happy to receive fuller information from the Government of the United States on this point, to enable it to appreciate the exact purport of the above-mentioned declaration. Such information is the more necessary inasmuch as the Government of the United States confirms, in its declaration, the attitude adopted by its representatives before the Court, to the effect that it is for the United States to decide what matters fall within its domestic jurisdiction. As a consequence, the American Government has maintained its decision to include within this exclusive jurisdiction the right to proceed to a sale of the shares.

3. Lastly, the Swiss Government ventures to recall to the Court and to the Government of the United States that its request for interim measures of protection was presented not only for the purpose of preventing the danger of an imminent sale of the shares of the General Aniline and Film Corporation. As appears from the request itself, and from the statements of the Swiss Co-Agent at the sitting of the Court on October 12th, 1957, the request is designed in general to ensure the execution of the subsequent decision of the Court, should that decision be in favour of Switzerland.

4. The Swiss Government, having received direct communication from the Government of the United States of the declaration addressed to the Court, which is set out in the Registrar's letter of October 19th, 1957, the Federal Political Department has thought it proper similarly to communicate the foregoing to the Government of the United States."

Whereas a copy of the above communication was on October 20th, 1957, transmitted to the Agent for the Government of the United States;

Whereas Switzerland and the United States of America have, by Declarations made on their behalf, accepted the compulsory jurisdiction of the Court on the basis of Article 36, paragraph 2 of the Statute;

Whereas by its subject-matter the present dispute falls within the purview of that paragraph;

Whereas the Government of the United States of America has invoked, against the request for the indication of interim measures of protection, the reservation by which it excluded from its Declaration matters essentially within its domestic jurisdiction as determined by the United States and whereas the Government accordingly "respectfully declines . . . to submit the matter of the sale or disposition of such shares to the jurisdiction of the Court";

Whereas at the hearing the Co-Agent of the Swiss Government challenged this reservation, on a number of grounds, and stated that, in its examination of a request for the indication of interim measures of protection, the Court would not wish to adjudicate "upon so complex and delicate a question as the validity of the American reservation";

Whereas the procedure applicable to requests for the indication of interim measures of protection is dealt with in the Rules of Court by provisions which are laid down in Article 61 and which appear, along with other procedures, in the section entitled: "Occasional Rules";

Whereas the examination of the contention of the Government of the United States requires the application of a different procedure, the procedure laid down in Article 62 of the Rules of Court and whereas if this contention is maintained, it will fall to be dealt with by the Court in due course in accordance with that procedure;

Whereas the request for the indication of interim measures of protection must accordingly be examined in conformity with the procedure laid down in Article 61;

Whereas, finally, the decision given under this procedure in no way pre-judges the question of the jurisdiction of the Court to deal with the merits of the case and leaves unaffected the right of the Respondent to submit arguments against such jurisdiction;

Whereas the Swiss Government, by its request of October 3rd for the indication by the Court "of the interim measures of protection which should be taken in order to safeguard the rights of the Swiss Federal Government" purported to submit its request "in conformity with Article 41 of the Statute and Article 61 of the Rules of Court";

Whereas the Court, in order to decide what action should be taken in pursuance of the request, must, in accordance with Article 41 of the Statute, ascertain what is required by the circumstances to preserve the respective rights of the Parties pending the decision of the Court;

Whereas, of the three points set forth in the submissions of Switzerland with regard to its request for the indication of interim measures of protection, the second is the only one which is formulated in terms fulfilling the requirement laid down in Article 61, paragraph 1, of the Rules and which relates to the concern of the Court to preserve the rights which may be subsequently adjudged by the Court to be long either to the Applicant or to the Respondent;

Whereas, accordingly, the Court must direct its attention to this point, namely, the request to the Government of the United States not to sell the shares of the General Aniline and Film Corporation claimed by the Swiss Government as the property of its nationals, so long as the proceedings in this dispute are pending;

Whereas in the light of the information furnished to the Court it appears that, according to the law of the United States, the sale of those shares can only be effected after termination of a judicial proceeding which is at present pending in that country in respect of which there is no indication as to its speedy conclusion, and whereas such a sale is therefore conditional upon a judicial decision rejecting the claims of Interhandel;

Whereas, on the other hand, in the statement of the views of the Government of the United States transmitted to the Court on October 19th, 1957, it is said that that Government "is not taking action at the present time to fix a time schedule for the sale of such shares";

Whereas, in the premises it does not appear to the Court that the circumstances require the indication of the provisional measures envisaged in the request of the Swiss Federal Government.

For these reasons,

THE COURT

finds that there is no need to indicate interim measures of protection.

Judge KLAESTAD appends to the Order a statement of his separate opinion,² in which President HACKWORTH and Judge READ concur.

² Judge Klaestad in his separate opinion took the position that, *prima facie*, the American objection was valid, but that this finding is itself provisional. No party having challenged the validity of the American reservation, it will be given effect.

Judge Sir Hersch LAUTERPACHT³ appends to the Order a statement of his separate opinion.

Judge WELLINGTON KOO makes the following declaration:

I agree with the decision of the Court not to indicate provisional measures in the case, but regret that I do not share the reasons upon which it is based. In my view, the Court has no jurisdiction to deal with the request for such measures. The Government of the United States raised an objection based upon Proviso (b) of its Declaration of August 14th, 1946, accepting the compulsory jurisdiction of the Court under paragraph (2) of Article 36 of the Statute. Proviso (b) states that the Declaration shall not apply to "... (b) disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America."

Although the objection was raised by the United States in the form of a Preliminary Objection, under Article 62 of the Rules of Court, to the proceedings instituted by the Swiss Government's Application of October 1st, 1957, "in so far as that application relates to the sale or other disposition of the shares of General Aniline and Film Corporation now held by the United States Government," it was, in fact, an objection directed against the Court's jurisdiction to indicate provisional measures, requested by the Swiss Government on October 3rd, 1957. This was made clear by the Agent of the United States in his observations at the proceedings held on October 12th and 14th, 1957, under paragraph 8 of Article 61 of the Rules of Court, when he urged that Proviso (b) to the United States' Declaration of Acceptance excluded the Court's jurisdiction in the matter of the sale or other disposition of the shares of the General Aniline and Film Corporation—a matter which the United States had determined to be essentially within its domestic jurisdiction in exercise of its reserved right under Proviso (b).

I consider that this objection is well founded, that the Court is not competent to deal with the Swiss request for indication of provisional measures and that its decision should be based upon this ground. The reason of lack of urgency is a true circumstance, but the placing of its decision on this ground carries an implication that the Court considers the said Proviso (b) to the United States' Declaration is not applicable to the matter of provisional measures, whereas, in my view, it is applicable.

Judge KOJEVNIKOV declares that he is unable to agree with the Order.

CASE CONCERNING RIGHT OF PASSAGE OVER INDIAN TERRITORY (PORTUGAL *v.* INDIA). PRELIMINARY OBJECTIONS. I.C.J. Reports, 1957, p. 125.

International Court of Justice. Judgment of November 26, 1957.

Jurisdiction of Court.—Optional Clause.—Article 36 of Statute.—Preliminary Objection.—Condition in Declaration providing for exclusion of categories of disputes at any time during validity of Declaration.—Consistency of Condition with Article 36 of Statute.—Total and partial denunciation.—Retroactive effect of exclusion.

³ Judge Lauterpacht's concurring opinion stated, *inter alia*, that the American objection destroyed any *prima facie* jurisdiction and that, therefore, the Court had no power under Article 41.

Deposit of Declaration with Secretary-General.—Interval between deposit of Declaration and filing of Application instituting proceedings.—Transmission by Secretary-General of copy of Declaration.

Article 36 (2) of Statute.—Prior definition of dispute through negotiations.

Reservation of disputes as to matters falling within domestic jurisdiction.—Joinder of Objection to merits.

Objection based on reservation ratione temporis.—“Disputes” and “acts or situations” prior to specified date.—Joinder of Objection to merits.¹

On December 22, 1955, Portugal filed an application submitting to the Court a dispute between Portugal and India concerning the right of passage over Indian territory between the territory of Daman and two enclaved territories as well as between the two enclaved territories. Portugal based jurisdiction on the acceptance of the Optional Clause² by both States. India filed preliminary objections, the nature of which appears from the opinion. After reciting the various submissions, the opinion of the Court³ stated in part (p. 140 *et seq.*):

The Declarations by which the Parties accepted the compulsory jurisdiction of the Court are as follows:

Declaration of India of February 28th, 1940:

“On behalf of the Government of India, I now declare that they accept as compulsory *ipso facto* and without special convention, on condition of reciprocity, the jurisdiction of the Court, in conformity with paragraph 2 of Article 36 of the Statute of the Court for a period of 5 years from to-day's date, and thereafter until such time as notice may be given to terminate the acceptance, over all disputes arising after February 5th, 1930, with regard to situations or facts subsequent to the same date, other than:

disputes in regard to which the Parties to the dispute have agreed or shall agree to have recourse to some other method of peaceful settlement;

disputes with the government of any other Member of the League which is a Member of the British Commonwealth of Nations, all of which disputes shall be settled in such manner as the Parties have agreed or shall agree;

disputes with regard to questions which by international law fall exclusively within the jurisdiction of India; and

disputes arising out of events occurring at a time when the Government of India were involved in hostilities;

and subject to the condition that the Government of India reserve the right to require that proceedings in the Court shall be suspended in respect of any dispute which has been submitted to and is under consideration by the Council of the League of Nations, provided that notice to suspend is given after the dispute has been submitted to the Council and is given within 10 days of the notification of the initiation of the proceedings in the Court.

¹ Citation by the Court.

² Art. 36, par. 2, of the Statute.

³ President Hackworth, Vice President Badawi, and Judges Guerrero, Basdevant, Finckh, Zoričić, Klaestad, Read, Armand-Ugon, Kojevnikov, Sir Muhammad Afrulla Khan, Sir Hersch Lauterpacht, Moreno Quintana, Córdova, Wellington Koo; Judges *ad hoc* Chagla and Fernandes.

and provided also that such suspension shall be limited to a period of 12 months or such longer period as may be agreed by the Parties to the dispute or determined by a decision of all the Members of the Council other than the Parties to the dispute."

Declaration of Portugal of December 19th, 1955:

"Under Article 36, paragraph 2, of the Statute of the International Court of Justice, I declare on behalf of the Portuguese Government that Portugal recognizes the jurisdiction of this Court as compulsory *ipso facto* and without special agreement, as provided for in the said paragraph 2 of Article 36 and under the following conditions:

- (1) The present declaration covers disputes arising out of events both prior and subsequent to the declarations of acceptance of the "optional clause" which Portugal made on December 16, 1920, as a party to the Statute of the Permanent Court of International Justice.
- (2) The present declaration enters into force at the moment it is deposited with the Secretary-General of the United Nations; it shall be valid for a period of one year, and thereafter until notice of its denunciation is given to the said Secretary-General.
- (3) The Portuguese Government reserves the right to exclude from the scope of the present declaration, at any time during its validity, any given category or categories of disputes, by notifying the Secretary-General of the United Nations and with effect from the moment of such notification."

* * * * *

India has filed six Preliminary Objections to the exercise of jurisdiction by the Court in the present case. The Court will now proceed to examine these Objections.

First Preliminary Objection

The First Preliminary Objection of the Government of India is to the effect that the Court is without jurisdiction to entertain the Application of Portugal on the ground that the Portuguese Declaration of Acceptance of the jurisdiction of the Court of December 19th, 1955, is invalid for the reason that the Third Condition of the Declaration is incompatible with the object and purpose of the Optional Clause. There are, in the view of the Government of India, three main reasons for such incompatibility.

The Third Condition of the Declaration of Portugal provides as follows:

- "(3) The Portuguese Government reserves the right to exclude from the scope of the present declaration, at any time during its validity, any given category or categories of disputes, by notifying the Secretary-General of the United Nations and with effect from the moment of such notification."

In the first instance, the Government of India maintains that that Condition gives Portugal the right, by making at any time a notification to that effect, to withdraw from the jurisdiction of the Court a dispute which has been submitted to it prior to such a notification. This is what in the course of the proceedings was described as the retroactive effect attaching to that notification. India asserts that

such retroactive effect is incompatible with the principle and notion of the compulsory jurisdiction of the Court as established in Article 36 of the Statute and that the Third Condition is invalid inasmuch as it contemplates an effect which is contrary to the Statute.

The Government of Portugal has contested that interpretation and has affirmed that the Third Condition does not have such retroactive effect and that, in consequence, it is not incompatible with Article 36 of the Statute.

In order to decide whether, as maintained by the Government of India, the Third Condition appended by Portugal is invalid, and whether such invalidity entails the invalidity of the Declaration in which it is contained, the Court must determine the meaning and the effect of the Third Condition by reference to its actual wording and applicable principles of law.

The words "with effect from the moment of such notification" cannot be construed as meaning that such a notification would have retroactive effect so as to cover cases already pending before the Court. Construed in their ordinary sense, these words mean simply that a notification under the Third Condition applies only to disputes brought before the Court after the date of the notification. Such an interpretation leads to the conclusion that no retroactive effect can properly be imputed to notifications made under the Third Condition. It is a rule of law generally accepted, as well as one acted upon in the past by the Court, that, once the Court has been validly seised of a dispute, unilateral action by the respondent State in terminating its Declaration, in whole or in part, cannot divest the Court of jurisdiction. In the *Nottebohm* case the Court gave expression to that principle in the following words:

"An extrinsic fact such as the subsequent lapse of the Declaration, by reason of the expiry of the period or by denunciation, cannot deprive the Court of the jurisdiction already established."
(*I.C.J. Reports 1953*, p. 123.)

That statement by the Court must be deemed to apply both to total denunciation, and to partial denunciation as contemplated by the Third Portuguese Condition. It is a rule of interpretation that a text emanating from a Government must, in principle, be interpreted as producing and as intended to produce effects in accordance with existing law and not in violation of it.

The second reason, contended for by the Government of India, for the incompatibility of the Third Portuguese Condition with the object and purpose of the Optional Clause, is that it has introduced into the Declaration a degree of uncertainty as to reciprocal rights and obligations which deprives the acceptance of the compulsory jurisdiction of the Court of all practical value. In particular, it was contended that, in consequence of the Third Condition, the other Signatories are in a continuous state of uncertainty as to their reciprocal rights and obligations which may change from day to day.

While it must be admitted that clauses such as the Third Condition bring about a degree of uncertainty as to the future action of the accepting government, that uncertainty does not attach to the position actually established by the Declaration of Acceptance or as it might be established in consequence of recourse to the Third Condition.

As Declarations, and their alterations, made under Article 36 must be deposited with the Secretary-General, it follows that, when a case is submitted to the Court, it is always possible to ascertain what are, at that moment, the reciprocal obligations of the Parties in accordance

with their respective Declarations. Under the existing system, Governments can rely upon being informed of any changes in the Declarations in the same manner as they are informed of total denunciations of the Declarations. It is true that during the interval between the date of a notification to the Secretary-General and its receipt by the Parties to the Statute, there may exist some element of uncertainty. However, such uncertainty is inherent in the operation of the system of the Optional Clause and does not affect the validity of the Third Condition contained in the Portuguese Declaration.

It must also be noted that, with regard to any degree of uncertainty resulting from the right of Portugal to avail itself at any time of its Third Condition of Acceptance, the position is substantially the same as that created by the right claimed by many Signatories of the Optional Clause, including India, to terminate their Declarations of Acceptance by simple notification without any obligatory period of notice. India did so on January 7th, 1956, when it notified the Secretary-General of the denunciation of its previous Declaration of Acceptance, for which it simultaneously substituted a new Declaration incorporating reservations which were absent from its previous Declaration. By substituting, on January 7th, 1956, a new Declaration for its earlier Declaration, India achieved, in substance, the object of Portugal's Third Condition.

It has been argued that there is a substantial difference, in the matter of the certainty of the legal situation, between the Third Portuguese Condition and the right of denunciation without notice. In the view of the Court there is no essential difference, with regard to the degree of certainty, between a situation resulting from the right of total denunciation and that resulting from the Third Portuguese Condition which leaves open the possibility of a partial denunciation of the otherwise subsisting original Declaration.

Neither can it be admitted, as a relevant differentiating factor, that while in the case of total denunciation the denouncing State can no longer invoke any rights accruing under its Declaration, in the case of a partial denunciation under the terms of the Third Condition Portugal can otherwise continue to claim the benefits of its Acceptance. For, as the result of the operation of reciprocity, any jurisdictional rights which it may thus continue to claim for itself can be invoked against it by the other Signatories, including India.

Finally, as the third reason for the invalidity of the Third Condition, it has been contended that that Condition offends against the basic principle of reciprocity underlying the Optional Clause inasmuch as it claims for Portugal a right which in effect is denied to other Signatories who have made a Declaration without appending any such condition. The Court is unable to accept that contention. It is clear that any reservation notified by Portugal in pursuance of its Third Condition becomes automatically operative against it in relation to other Signatories of the Optional Clause. If the position of the Parties as regards the exercise of their rights is in any way affected by the unavoidable interval between the receipt by the Secretary-General of the appropriate notification and its receipt by the other Signatories, that delay operates equally in favour of or against all Signatories and is a consequence of the system established by the Optional Clause.

Neither can the Court accept the view that the Third Condition is inconsistent with the principle of reciprocity inasmuch as it renders inoperative that part of paragraph 2 of Article 36, which refers to

Declarations of Acceptance of the Optional Clause in relation to States accepting the "same obligation." It is not necessary that the "same obligation" should be irrevocably defined at the time of the deposit of the Declaration of Acceptance for the entire period of its duration. That expression means no more than that, as between States adhering to the Optional Clause, each and all of them are bound by such identical obligations as may exist at any time during which the Acceptance is mutually binding.

As the Court finds that the Third Portuguese Condition is not inconsistent with the Statute, it is not necessary for it to consider the question whether, if it were invalid, its invalidity would affect the Declaration as a whole.

For these reasons, the First Preliminary Objection of the Government of India must be dismissed.

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Second Preliminary Objection

The Second Preliminary Objection of the Government of India is based on the allegation that—as the Portuguese Application of December 22nd, 1955, was filed before the lapse of such brief period as in the normal course of events would have enabled the Secretary-General of the United Nations, in compliance with Article 36, paragraph 4, of the Statute of the Court, to transmit copies of the Portuguese Declaration of Acceptance of December 19th, 1955, to the other Parties to the Statute—the filing of the Application violated the equality, mutuality and reciprocity to which India was entitled under the Optional Clause and under the express condition of reciprocity contained in its Declaration of February 28th, 1940; that in consequence, the conditions necessary to entitle the Government of Portugal to invoke the Optional Clause against India did not exist when that Application was filed; and that, as a result, the Court is without jurisdiction to entertain the Application.

The principle of reciprocity forms part of the system of the Optional Clause by virtue of the express terms both of Article 36 of the Statute and of most Declarations of Acceptance, including that of India. The Court has repeatedly affirmed and applied that principle in relation to its own jurisdiction. It did so, in particular, in the case of *Certain Norwegian Loans* (*I.C.J. Reports* 1957, pp. 22-24) where it recalled its previous practice on the subject. However, it is clear that the notions of reciprocity and equality are not abstract conceptions. They must be related to some provision of the Statute or of the Declarations.

The two questions which the Court must now consider are as follows: in filing its Application on the date that it did, namely, December 22nd, 1955, did Portugal act in a manner contrary to any provision of the Statute? If not, did it thereby violate any right of India under the Statute or under its Declaration?

In the course of the oral argument the Government of India disclaimed any intention of contending that Portugal was not entitled to file its Application until the notification of the Secretary-General had reached the Government of India. The latter merely maintained that before filing its Application Portugal ought to have allowed such period to elapse as would reasonably have permitted the notification of the Secretary-General to take its "appropriate effects."

The material dates, as stated by the Government of India, are as follows: On December 19th, 1955, the Representative of Portugal to the United Nations made the Declaration, on behalf of the Government of Portugal, accepting the compulsory jurisdiction of the Court under the Optional Clause. On December 22nd, the Government of Portugal filed in the Court the Application instituting the present proceedings against the Government of India. On the same day, a telegram was sent by the Court notifying the Government of India of the filing of the Portuguese Application. On December 30th, 1955, the Government of India received a copy of the Portuguese Declaration of Acceptance which had been obtained from the Court by its Embassy at The Hague. On January 19th, 1956, a copy of the Portuguese Declaration was officially transmitted to the Government of India by the Secretary-General of the United Nations in compliance with Article 36, paragraph 4, of the Statute.

The Government of India has contended that, in filing its Application on December 22nd, 1955, the Government of Portugal did not act in conformity with the provisions of the Statute. The Court is unable to accept that contention. The Court considers that, by the deposit of its Declaration of Acceptance with the Secretary-General, the accepting State becomes a Party to the system of the Optional Clause in relation to the other declarant States, with all the rights and obligations deriving from Article 36. The contractual relation between the Parties and the compulsory jurisdiction of the Court resulting therefrom are established, "*ipso facto* and without special agreement," by the fact of the making of the Declaration. Accordingly, every State which makes a Declaration of Acceptance must be deemed to take into account the possibility that, under the Statute, it may at any time find itself subjected to the obligations of the Optional Clause in relation to a new Signatory as the result of the deposit by that Signatory of a Declaration of Acceptance. A State accepting the jurisdiction of the Court must expect that an Application may be filed against it before the Court by a new declarant State on the same day on which that State deposits with the Secretary-General its Declaration of Acceptance. For it is on that very day that the consensual bond, which is the basis of the Optional Clause, comes into being between the States concerned. When India made its Declaration of Acceptance of February 28th, 1940, it stated that it accepted the jurisdiction of the Court for a specified period "from to-day's date."

It has been contended by the Government of India that as Article 36 requires not only the deposit of the Declaration of Acceptance with the Secretary-General but also the transmission by the Secretary-General of a copy of the Declaration to the Parties to the Statute, the Declaration of Acceptance does not become effective until the latter obligation has been discharged. However, it is only the first of these requirements that concerns the State making the Declaration. The latter is not concerned with the duty of the Secretary-General or the manner of its fulfilment. The legal effect of a Declaration does not depend upon subsequent action or inaction of the Secretary-General. Moreover, unlike some other instruments, Article 36 provides for no additional requirement, for instance, that the information transmitted by the Secretary-General must reach the Parties to the Statute, or that some period must elapse subsequent to the deposit of the Declaration before it can become effective. Any such requirement would introduce an element of uncertainty into the opera-

tion of the Optional Clause system. The Court cannot read into the Optional Clause any requirement of that nature.

India has further contended that, even though the filing of the Application by Portugal be held to be otherwise in accordance with Article 36, it was effected in a manner which violated rights of India under the Statute and under its Declaration of Acceptance.

Apart from complaining generally of an impairment of its rights of equality, mutuality and reciprocity under the Statute, India has not specified what actual right has been adversely affected by the manner of the filing of the Portuguese Application. The Court has been unable to discover what right has, in fact, thus been violated.

As the Court has arrived at the conclusion that the manner of filing the Portuguese Application was neither contrary to Article 36 of the Statute nor in violation of any right of India under the Statute, or under its Declaration of Acceptance, the Court must dismiss the Second Preliminary Objection of the Government of India.

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Fourth Preliminary Objection

As the Second and Fourth Preliminary Objections are concerned with cognate aspects of the filing of the Portuguese Application, it is convenient to consider the Fourth Preliminary Objection before examining the Third.

In the Fourth Preliminary Objection, India contended that, since it had no knowledge of the Portuguese Declaration before Portugal filed its Application, it was unable to avail itself, on the basis of reciprocity, of the Third Portuguese Condition and to exclude from the jurisdiction of the Court the dispute which is the subject-matter of the Portuguese Application. This Objection is based on considerations substantially identical with those adduced in support of the Second Preliminary Objection. Accordingly, the Court will confine itself to recalling what it has already said in dealing with the Second Preliminary Objection, in particular that the Statute does not prescribe any interval between the deposit by a State of its Declaration of Acceptance and the filing of an Application by that State, and that the principle of reciprocity is not affected by any delay in the receipt of copies of the Declaration by the Parties to the Statute.

As the manner of the filing of the Portuguese Application did not in respect of the Third Portuguese Condition deprive India of any right of reciprocity under Article 36 of the Statute, so as to constitute an abuse of the Optional Clause, the Court cannot regard the Fourth Preliminary Objection of the Government of India as well founded.

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Third Preliminary Objection

In its Third Preliminary Objection, as defined in the Submissions, the Government of India contended that, as the Portuguese Application of December 22nd, 1955, was filed before the Portuguese claim was effectively made the subject of diplomatic negotiations, the subject-matter of the claim had not yet been determined and that there was therefore, as yet, no legal and justiciable dispute between the Parties which could be referred to the Court under the Optional Clause. It was therefore submitted that, as the conditions necessary to entitle

the Government of Portugal to invoke the Optional Clause did not exist at the time of the Application, the Court is without jurisdiction to entertain the Application.

In particular, the Third Objection is based on the allegation that, although neither Article 36(2) of the Statute nor the Portuguese or Indian Declarations of Acceptance refer directly to the requirement of previous negotiations, the fact that the Application was filed prior to the exhaustion of diplomatic negotiations was contrary to Article 36(2) of the Statute, which refers to legal disputes. It was contended by India that, unless negotiations had taken place which had resulted in a definition of the dispute between the Parties as a legal dispute, there was no dispute, in the sense of Article 36(2) of the Statute, the existence of which had been established in the Application and with respect to which the Court could exercise jurisdiction.

In examining this Objection, the Court must consider the question of the extent to which, prior to the filing of the Application by Portugal, negotiations had taken place between the Parties in the matter of the right of passage. An examination of these negotiations shows that, although they cover various aspects of the situation arising out of the political claims of India in respect of the enclaves, a substantial part of these exchanges of views was devoted, directly or indirectly, to the question of access to the enclaves. A survey of the correspondence and Notes laid before the Court reveals that the alleged denial of the facilities of transit to the enclaves provided the subject-matter of repeated complaints on the part of Portugal; that these complaints constituted one of the principal objects of such exchanges of views as took place; that, although the exchanges between the Parties had not assumed the character of a controversy as to the nature and extent of the legal right of passage, Portugal described the denial of passage requested by it as being inconsistent not only with requirements of good neighbourly relations but also with established custom and international law in general; and that these complaints were unsuccessful.

While the diplomatic exchanges which took place between the two Governments disclose the existence of a dispute between them on the principal legal issue which is now before the Court, namely, the question of the right of passage, an examination of the correspondence shows that the negotiations had reached a deadlock.

It would therefore appear that assuming that there is substance in the contention that Article 36(2) of the Statute, by referring to legal disputes, establishes as a condition of the jurisdiction of the Court a requisite definition of the dispute through negotiations, the condition was complied with to the extent permitted by the circumstances of the case.

The Court finds that the legal issue was sufficiently disclosed in the diplomatic exchanges, and considers that the Government of Portugal has complied with the conditions of the Court's jurisdiction as laid down in Article 36(2) of the Statute. Accordingly, the Court must dismiss the Third Preliminary Objection.

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Fifth Preliminary Objection

In its Fifth Preliminary Objection the Government of India has relied on the reservation which forms part of its Declaration of Acceptance of February 28th, 1940, and which excludes from the juris-

action of the Court disputes with regard to questions which by international law fall exclusively within the jurisdiction of the Government of India. In particular, it was asserted by the Government of India that the facts and the legal considerations adduced before the Court did not permit the conclusion that there was a reasonably arguable case for the contention that the subject-matter of the dispute is outside the exclusive domestic jurisdiction of India. It was therefore submitted that the dispute is outside the jurisdiction of the Court.

The relevant Submissions of the Government of India filed on September 27th, 1957, are based largely on the following assertions: in paragraph (a) of its Submissions on the Fifth Objection it is asserted that "the Portuguese claim to a right of transit . . . cannot be regarded as a reasonably arguable cause of action under international law unless it is based on the express grant or specific consent of the territorial sovereign," and that "the facts presented to the Court in the Pleadings of the Parties show no such express grant or specific consent of the territorial sovereign as could place a limitation on the exercise of India's jurisdiction. . . ." In paragraph (b) it is asserted that none of the grounds put forward by the Government of Portugal, namely, treaty, custom and general principles of law, can be regarded on the facts and the law which have been presented to the Court as reasonably arguable under international law. Paragraph (c) deals exclusively with factual aspects of the matter before the Court. India urges that the Fifth Preliminary Objection must be sustained for the reason that "regardless of the correctness or otherwise of the conclusions set out in paragraphs 4(a) and 4(b), the uncontradicted facts presented in the Pleadings of the Parties establish that the question of transit between Daman and the enclaves has always been dealt with both by Portugal and the territorial sovereign on the basis that it is a question within the exclusive competence of the territorial sovereign." Finally, in paragraph (d) it is urged that the dispute submitted to the Court by Portugal is not a legal dispute which may be decided by the Court under Article 38, paragraph 1, of the Statute.

The facts on which those Submissions of the Government of India are based are not admitted by Portugal. The elucidation of these facts, and their legal consequences, involves an examination of the actual practice of the British, Indian and Portuguese authorities in the matter of the right of passage—in particular as to the extent to which that practice can be interpreted, and was interpreted by the Parties, as signifying that the right of passage is a question which according to international law is exclusively within the domestic jurisdiction of the territorial sovereign. There is the further question as to the legal significance of the practice followed by the British and Portuguese authorities, namely, whether that practice was expressive of the common agreement of the Parties as to the exclusiveness of the rights of domestic jurisdiction or whether it provided a basis for a resulting legal right in favour of Portugal. There is, again, the question of the legal effect and of the circumstances surrounding the application of Article 17 of the Treaty of 1779 and of the Mahratha Decrees issued in pursuance thereof.

Having regard to all these and similar questions, it is not possible to pronounce upon the Fifth Preliminary Objection at this stage without prejudging the merits. Accordingly, the Court decides to join that Objection to the merits.

In these circumstances, it is not necessary for the Court to examine the other questions relating to the Fifth Objection which have been raised by the Parties in their Submissions.

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Sixth Preliminary Objection

In its Sixth Objection the Government of India contended that the Court is without jurisdiction on the ground that India's Declaration of February 28th, 1940, accepting the compulsory jurisdiction of the Court is limited to "disputes arising after February 5th, 1930, with regard to situations or facts subsequent to the same date." In particular, the Government of India maintained: (a) that the dispute submitted to the Court by Portugal is a dispute which did not arise after February 5th, 1930, and (b) that in any case it is a dispute with regard to situations and facts prior to that date.

The Court must examine the relevant Indian reservation, in the first instance, in so far as it refers to the date on which the dispute may be said to have arisen. The first contention advanced in this connection by the Government of India is that the dispute submitted to the Court did not arise after February 5, 1930, but—partly or wholly—before that date. However, the Government of Portugal contends that the dispute submitted to the Court arose after 1953, when the Government of India adopted certain measures relating to passage and transit between the littoral territory of Daman and the enclaves of Dadra and Nagar-Aveli.

That divergence of views cannot be separated from the question whether or not the dispute submitted to the Court is only a continuation of a dispute which divided Portugal and the territorial sovereign prior to 1930 concerning the right of passage. The Court, having heard conflicting arguments regarding the nature of the passage formerly exercised, is not in a position to determine at this stage the date on which the dispute arose or whether or not the dispute constitutes an extension of a prior dispute.

Similar considerations apply to the second element of the reservation *ratione temporis* which forms part of the Indian Declaration of Acceptance, namely, in so far as it refers to "situations or facts" subsequent to 5th February, 1930.

It was contended that the question of the existence or non-existence of a legal right of passage was not, prior to 1930, in controversy between the Parties concerned and that they managed throughout to settle, without raising or resolving the question of legal right, the practical problems arising in this connection. On the other hand it was also contended that the dispute now before the Court is a continuation of a conflict of views going as far as 1818, and that it is a dispute "beyond any question with reference to situations or facts stretching far back before 1930."

The Court is not at present in possession of sufficient evidence to enable it to pronounce on these questions. To do that would necessitate an examination and clarification of, often complicated, questions of fact bearing on the practice pursued by the authorities concerned for a period of very considerable duration and stretching back to 1818, or even 1779. There are other factors which give rise to similar considerations. These factors include the disputed interpretation of the Treaty of 1779 between the Mahrathas and the Portuguese. Any evaluation of these factors, although limited to the purpose of the Sixth Preliminary Objection, would entail the risk of prejudging some of the issues closely connected with the merits. Ac-

Accordingly, the Court must join the Sixth Preliminary Objection to the merits.

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The Government of Portugal added to its Submissions a statement requesting the Court to recall to the Parties the universally admitted principle that they should facilitate the accomplishment of the task of the Court by abstaining from any measure capable of exercising a prejudicial effect in regard to the execution of its decisions or which might bring about either an aggravation or an extension of the dispute. The Government of Portugal has expressly disclaimed any intention of invoking the provisions of Article 41 of the Statute concerning the indication of interim measures. The Court does not consider that, in the circumstances of the present case, it should comply with the request of the Government of Portugal.

For these reasons,

THE COURT

by fourteen votes to three,
rejects the First Preliminary Objection;
by fourteen votes to three,
rejects the Second Preliminary Objection;
by sixteen votes to one,
rejects the Third Preliminary Objection;
by fifteen votes to two,
rejects the Fourth Preliminary Objection;
by thirteen votes to four,
joins the Fifth Preliminary Objection to the merits;
by fifteen votes to two,
joins the Sixth Preliminary Objection to the merits; resumes the proceedings on the merits; . . .

Judge KOJALNIKOV states that he cannot concur either in the operative clause or in the reasoning of the Judgment because, in his opinion, the Court should at the present stage of the proceedings hold that it is without jurisdiction on one or indeed more of the Preliminary Objections raised by the Government of India.

Vice-President BADAWI, availing himself of the right conferred upon him by Article 57 of the Statute, appends to the Judgment of the Court a statement of his dissenting opinion.

Judge KLAESTAD, availing himself of the right conferred upon him by Article 57 of the Statute, appends to the Judgment of the Court a statement of his dissenting opinion, in which M. FERNANDES, Judge *ad hoc*, concurs.

M. CHAGLA, Judge *ad hoc*, availing himself of the right conferred upon him by Article 57 of the Statute, appends to the Judgment of the Court a statement of his dissenting opinion. . . .

Contracts—illegality under foreign law

REGAZZONI v. K. C. SETHIA, LTD. [1957] 3 All E.R. 286.

House of Lords, Oct 21, 1957. Viscount Simonds, Lord Reid, Lord Cohen, Lord Keith of Avonholm and Lord Somervell of Harrow.¹

The Central Government of India, by an order of July 17, 1946, made pursuant to the Sea Customs Act, 1878, prohibited the taking out of

¹ The case is reported in the lower courts in [1956] 1 All E. R. 229 and 2 All E. R. 27. It is noted in 50 A.J.I.L. 686 (1956) and 51 A.J.I.L. 128 (1957).

British India of any goods destined directly or indirectly for the Union of South Africa. Regazzoni, a resident of Switzerland, made an agreement with K. C. Sethia (1944), Ltd., an English company, to buy jute bags c.i.f. Genoa. Both parties contemplated that the goods should be shipped from India and made available in Genoa so that the buyer might resell to a South African buying agency. The seller, who repudiated the contract as illegal and void, failed to deliver the goods. The buyer brought an action for damages based on breach of contract. The contract provided that English law should govern.

On appeal by the buyer from an order dismissing the action, the Court held that on the basis of international comity the contract was unenforceable in an English court because performance would have involved, as the parties knew, doing in a friendly and foreign country an act which would have violated a law of that country.

Viscount Simonds distinguished the recent case of *Government of India v. Taylor*, [1955] 1 All E.R. 292, wherein it was held that an English court would not enforce the penal or revenue laws of another country at the suit of that country, and refused to extend that case to laws having a "political" or "public" character in a suit between private persons.

The Court quoted with approval at p. 292 the judgment of Scrutton, L.J., in *Ralli Bros. v. Compania Naviera Sota y Aznar*, [1920] 2 K.B. 287, 304:

. . . where a contract requires an act to be done in a foreign country, it is, in the absence of very special circumstances, an implied term of the continuing validity of such a provision that the act to be done in the foreign country shall not be illegal by the law of that country. This country should not in my opinion assist or sanction the breach of the laws of other independent states.

The Court continued:

In the *Ralli Brothers* case the relevant law was not a revenue law, and I am content to assume that SCRUTTON, L.J., might have qualified his statement if he had such a law in mind. But I venture to return to what I said earlier in this opinion. It does not follow from the fact that today the court will not enforce a revenue law at the suit of a foreign state that today it will enforce a contract which requires the doing of an act in a foreign country which violates the revenue law of that country. The two things are not complementary or co-extensive. This may be seen if for revenue law penal law is substituted. For an English court will not enforce a penal law at the suit of a foreign state, yet it would be surprising if it would enforce a contract which required the commission of a crime in that state. It is sufficient, however, for the purposes of the present appeal to say that, whether or not an exception must still be made in regard to the breach of a revenue law in deference to old authority, there is no ground for making an exception in regard to any other law.

The justices also agreed that the principle announced in *Foster v. Driscoll*, [1929] 1 K.B. 470² was controlling, and by way of *dicta* threw doubt on

the continuing validity of the doctrine announced in *Boucher v. Lawson*, [1736] 94 E.R. 1116.²

In discussing the relationship between the enforcement of the contract and international law and relations, Lord Reid declared:

To my mind, the question whether this contract is enforceable by English courts is not, properly speaking, a question of international law. The real question is one of public policy in English law; but, in considering this question, we must have in mind the background of international law and international relationships often referred to as the comity of nations. This is not a case of a contract being made in good faith but one party thereafter finding that he cannot perform his part of the contract without committing a breach of foreign law in the territory of the foreign country. If this contract is held to be unenforceable it should, in my opinion, be because from the beginning the contract was tainted so that the courts of this country will not assist either party to enforce it. (p. 293.)

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Finally, it was argued that, even if there be a general rule that our courts will take notice of foreign laws so that agreements to break them are unenforceable, that rule must be subject to exceptions, and this Indian law is one of which we ought not to take notice. It may be that there are exceptions. I can imagine a foreign law involving persecution of such a character that we would regard an agreement to break it as meritorious. But this Indian law is very far removed from anything of that kind. It was argued that this prohibition of exports to South Africa was a hostile act against a Commonwealth country with which we have close relations, that such a prohibition is contrary to international usage, and that we cannot recognise it without taking sides in the dispute between India and South Africa.

My Lords, it is quite impossible for a court in this country to set itself up as a judge of the rights and wrongs of a controversy between two friendly countries, we cannot judge the motives or the justifications of governments of other countries in these matters, and, if we tried to do so, the consequences might seriously prejudice international relations. (p. 294.)

In the same vein Lord Keith of Avonholm declared:

In the present case I see no escape from the view that to recognise the contract between the appellant and the respondents as an enforceable contract would give a just cause for complaint by the Government of India and would be contrary to our conceptions of international comity. On grounds of public policy, therefore, this is a contract which our courts ought not to recognise. It is said that the Indian legislation is discriminatory legislation against a country which is a member of the Commonwealth and with which this country is on friendly terms.

² The decision in this case was that a certain partnership designed to run whiskey into the United States during prohibition was illegal.

³ This case involved a contract which was upheld despite the fact it involved a violation of a Portuguese law prohibiting the export of gold. The decision purportedly announced the "revenue" law exception to the general principle of non-enforceability.

But that, in my opinion, is irrelevant. The English courts cannot be called on to adjudicate on political issues between India and South Africa. The Indian law is not a law repugnant to English conceptions of what may be regarded as within the ordinary field of legislation or administrative order even in this country. It is the illegality under the foreign law that is to be considered and not the effect of the foreign law on another country. (pp. 295, 296.)

Sovereign immunity—unauthorized transfer of debt—beneficial title

RAHIMTOOLA v. H.E.H. THE NIZAM OF HYDERABAD AND OTHERS. [1957] 3 All E.R. 441.

House of Lords, Nov. 7, 1957. Viscount Simonds, Lord Reid, Lord Cohen, Lord Somervell of Harrow and Lord Denning.¹

The subject matter of the controversy was a debt of approximately £1,000,000 originally standing in the name of the Nizam of Hyderabad in a London bank. Parties with ostensible authority to deal with the fund had it transferred to Rahimtoola, then holding the office of High Commissioner in London for the state of Pakistan. The Nizam brought an action to recover the money, claiming *inter alia* that the money was held in trust and (on appeal) that the parties had no authority to effect the transfer. The state of Pakistan impleaded its sovereign immunity, claiming legal (though not equitable) title to the debt. The Chancery Division, per Upjohn, J., sustained the contention of Pakistan.² This holding was reversed by the Court of Appeal.³ The House of Lords, in reversing the Court of Appeal, held: (1) that as to Rahimtoola, the writ should be set aside because the legal title to the debt had vested in him as agent of a sovereign state, which could refuse to have the title of its agent investigated by the court; (2) that the action against the bank should be stayed, since to recover from the bank the money to which the state of Pakistan was nominally entitled would interfere with the legal rights of that sovereign; (3) that principles of agency, whereby, under certain circumstances involving mistake of fact, a payor may reclaim payment prior to its transfer from an agent to his principal, have no application when the principal is a sovereign state; and (4) that the doctrine that an English court would not stay its administration of an English trust in which a foreign sovereign claimed an interest was not applicable when the alleged trustee was a foreign sovereign state.

Viscount Simonds accepted the conclusion of Romer, L.J. ([1957] 1 All E.R. at 271), that Rahimtoola accepted the transfer in his official capacity as agent of Pakistan, stating:

That the government of Pakistan were the principals (disclosed or undisclosed, it matters not) for whom the appellant as agent held the account in question with the bank, is, as I have already said, established beyond doubt. They were, and are, in a posi-

¹ Since the detailed facts in this celebrated case have been previously twice reported, only a summary statement is included herein.

² [1956] 3 All E.R. 311; [1956] 3 W.L.R. 667. See report in 51 A.J.I.L. 118 (1957).

³ [1957] 1 All E.R. 257. See report in 51 A.J.I.L. 632 (1957).

tion to sue the bank either in the name of the agent, the appellant, or, if he were unwilling that his name be used, in their own name adding him as a defendant. The bank could not pay any other person without disregard of, and detriment to, their interests. For the bank knows only the appellant and knows him, as I think, though it does not matter, as the agent of the government. I do not understand what difference it makes to this simple fact that before the Court of Appeal it was proved, or at least asserted and not disproved, that Mohi exceeded his authority in making the transfer to the appellant. It would, or might be, important if the matter was litigated, but that is just what the government of Pakistan through its agent declines to do. Much stress has been laid on the fact that it has not asserted a beneficial interest in the fund. But why should it? It is not concerned to admit, assert or deny. It has the legal title, which cannot be displaced except by litigation which it is entitled to decline. It rests on the principle, the statement of which I take from the judgment of the Court of Appeal in *Haile Selassie v. Cable & Wireless, Ltd.* [1938] 3 All E.R. 384, just because the respondent particularly relied on that case (*ibid.*, at p. 386):

"... if property locally situate in this country is shown to belong to, or to be in the possession of, an independent foreign sovereign, or his agent, the courts cannot listen to a claim which seeks to interfere with his title to that property, or to deprive him of possession of it."

It is true that in that case the court did not decline to adjudicate on the claim of a foreign sovereign state; it did so on the ground that, as there stated (*ibid.*, at p. 388):

"In the case of a debt such as that with which we are concerned, there can be no question of possession or control, and the title to it is the very thing which stands to be established or not to be established in these proceedings." (p. 446.)

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Your Lordships are not concerned to consider whether the principle, which was there correctly stated, was also there correctly applied. In the present case its application does not appear to me to be in doubt. The property in dispute is situate in this country. I say that, because it is for many purposes necessary to ascribe a situation to a chose in action which physically has none, and for the purpose of this doctrine no other situation can be ascribed to it than the place in which it can be sued for and enforced. A suit by a third party, the Nizam, is calculated and intended to interfere with the title of the appellant and his principals, the government of Pakistan, and with their possession or control of their property. It can only be maintained if the government of Pakistan take a course which their sovereign dignity entitles them to reject and descend into the arena. I have used the words "possession or control" because they are the words used in the statement of principle that I have adopted. It may be said that "possession" is not an apt word in connexion with a chose in action, but it seems to me that the two words, whether used together or separately, are apt to describe the relation in which an owner stands to the property which he owns. I would deprecate fine distinctions in our municipal laws in the application of international doctrine. Let it be supposed that a bank holds valuables, as for instance gold bars, on account of a foreign government or its agent, and at the same time

is indebted to the same party on current or deposit account in a sum of £ x. It has been made clear by the recent case of *United States of America & Republic of France v. Dollfus Mieg et Compagnie S.A. & Bank of England* ([1952] 1 All E.R. 572) that the foreign government could deny the jurisdiction of an English court to adjudicate on their rights in regard to the valuables. (p. 447.)

As to the law laid down by *Buller v. Harrison*, (1777) 2 Cowp. 565; 98 E.R. 1243, whereby an agent is personally liable for the repayment to a third person of money received under a mistake of fact where no transmittal to the principal has occurred, the Court said:

My Lords, I am not concerned to deny that, in a suit in which private persons only are concerned, the rule in *Buller v. Harrison*, if I may call it so, may prevail, though I would suppose that in any case the principal should not be denied the opportunity of asserting that the money was not paid to his agent in consequence, for instance, of a mistake of fact. But where, as for this purpose I assume to be the case here, the transfer is made to one who, if not an "organ" of a foreign government, is demonstrably its servant and agent, it would make a strange breach in the international principle if it were open to a third party to recover from the agent by the mere assertion of mistake or other wrongful act. That is the very thing which the agent on behalf of his principal is concerned to dispute, and, if his principal is a foreign sovereign, it is the very thing on which the courts of this country may not adjudicate in the face of the foreign sovereign's objection. I look again at the writ to see what is the substance of the matter. The claim is that money was paid to the appellant in trust for the Nizam or as money due and owing to the Nizam or as money had and received to the use of the Nizam. These are matters which directly concern the principals on whose behalf the appellant received the money. They cannot be determined without impleading him. Therefore they cannot be determined at all. (p. 448.)

In refutation of the argument that the *Dollfus Mieg case* was to be distinguished on the ground that it involved a bailment, whereas the present case involved a *chose in action*, Viscount Simonds stated:

. . . I should regard it as deplorable if the court, while accepting as a matter of comity the right of the foreign government to deny its jurisdiction in regard to valuables, yet rejected it in regard to a *chose in action*. To make one law in regard to valuables, bars of gold or perhaps bearer bonds, and another in regard to simple contract debts is not a policy that should recommend itself to your Lordships. Whether the property is a gold bar or a debt, the government of Pakistan is the legal owner and is entitled to refuse to have its title investigated. (p. 447.)

Lord Reid disposed of this point by stating:

Normally, a person who claims repayment would have to sue the principal, and I have found nothing to suggest that these cases would apply to a case where the person claiming payment could not successfully sue the principal. In the present case, the sovereign immunity of Pakistan would prevent an action against that state . . . (p. 450.)

Lord Denning, after analyzing the facts and their legal implications in a manner sympathetic to the contentions of the respondent, the Nizam of Hyderabad, and after analyzing a number of familiar cases touching sovereign immunity in order to demonstrate the confusing and unsatisfactory condition of the law on this subject, concluded by nonetheless supporting the appeal. He stated:

... Faced with an inconsistency between two lines of cases, the only course is to see which is more consistent with principle. For this we go back, as Upjohn, J., did, to the words of that great international lawyer Sir Robert Phillimore in *The Charkieh* (6) ((1873), L.R. A. & E. 59 at p. 97) who, after a full review of the authorities said this:

"The object of international law, in this as in other matters, is, not to work injustice, not to prevent the enforcement of a just demand, but to substitute negotiations between governments, though they may be dilatory and the issue distant and uncertain, for the ordinary use of courts of justice in cases where such use would lessen the dignity or embarrass the functions of the representatives of a foreign state. . . ."

Applying this principle it seems to me that at the present time sovereign immunity should not depend on whether a foreign government is implicated, directly or indirectly, but rather on the nature of the dispute. Not on whether "conflicting rights have to be decided," but on the nature of the conflict. Is it properly cognizable by our courts or not? If the dispute brings into question, for instance, the legislative or international transactions of a foreign government, or the policy of its executive, the court should grant immunity if asked to do so, because it does offend the dignity of a foreign sovereign to have the merits of such a dispute canvassed in the domestic courts of another country; but if the dispute concerns, for instance, the commercial transactions of a foreign government (whether carried on by its own departments or agencies or by setting up separate legal entities), and it arises properly within the territorial jurisdiction of our courts, there is no ground for granting immunity.

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I would, therefore, for myself approach this case somewhat broadly and ask whether the dispute is one properly cognizable by our courts; and I would test it by asking what would be the position if the transaction had taken place, not between the Finance Minister of Hyderabad and the Foreign Secretary of Pakistan, but between the Finance Minister of Hyderabad and the Foreign Secretary of Great Britain, and the money had been transferred not into the name of the High Commissioner of Pakistan but into the name of a high officer such as a Custodian of Property? Would an action lie in our courts for the return of the money? Clearly not. The transaction was more in the nature of a treaty than a contract or a trust. Reference would be made to such well-known cases as *Nabob of the Carnatic v. East India Co.* (26) ((1793), 2 Ves. 56) and *Civilian War Claimants Assn., Ltd. v. R.* (27) ([1932] A.C. 14) to show that no action would lie for money had and received or on a trust. The court would not listen to an inquiry whether the Finance Minister of Hyderabad had authority to make the transfer. It would say that any representa-

tions to that effect must be made to the Crown and not to the courts. If our courts would not in like circumstances entertain an action against our own government or its agent, they should not entertain an action against the State of Pakistan or its agent. Upjohn, J., put the point in a sentence when he said ([1956] 3 All E.R. at p. 320):

"The present transaction was an inter-governmental transaction: let it be solved by inter-governmental negotiations."

That is the kernel of the matter. I agree with it and would allow the appeal. (pp. 463, 464.)

NOTES

Treaties—invalidity of Senate "reservation" as law of the land—matter of "domestic concern" not part of treaty—Constitutional issue not decided

The judgment of the Court of Appeals for the District of Columbia in *Power Authority of the State of New York v. Federal Power Commission*, 247 F.2d 538 (June 20, 1957), digested in 51 A.J.I.L. 797 (1957), was vacated and the case remanded for dismissal as moot. *American Public Power Association et al v. Power Authority of the State of New York*, 78 S. Ct. 142, 355 U. S. 64 (U. S. Sup. Ct., November 18, 1957, *Per Curiam*).

Deportability for past membership in Communist Party—effect of 1951 Amendment on construction of 1950 Act

Alien, bringing *habeas corpus* proceeding to test deportation order, had testified in an earlier hearing of membership in the Communist Party for one year in 1935 and of working in a Communist bookstore during that period. On the basis of this testimony, petitioner was found to have been a member. The Court, per Mr. Justice Frankfurter, in a 5-4 decision, held that the 1951 amendment¹ to the Internal Security Act of 1950² showed a basis for construction of the rigorous statute, and, on this construction, the evidence was not sufficient for the order. *Rowoldt v. Perfetto*, 78 S. Ct. 180, 355 U. S. 115 (U. S. Supreme Court, Dec. 9, 1957, Frankfurter, J.; Harlan, Burton, Clark and Whittaker, JJ., dissenting).

Conspiracy in England to defraud persons in Germany

In *Board of Trade v. Owen*, [1957] 1 All E.R. 411, the House of Lords affirmed the decision of the Court of Criminal Appeal, *sub nom. Regina v. Owen*, [1956] 3 All E.R. 432, noted, 51 A.J.I.L. 429 (1957), convicting defendants of conspiring to commit a crime abroad. Lord Tucker reserved for future consideration the question whether a conspiracy in England, wholly to be carried out abroad, may not be indictable in England on proof that its performance would produce a public mischief in England or injure one of its subjects by causing him damage abroad.

¹ 65 Stat. 28.

² 64 Stat. 987.

International Claims Settlement Act—provision for no judicial review of denial of claim

In *American and European Agencies v. Gilliland*, 247 F.2d 95 (Ct. A., Dist. Col., June 27, 1957, Washington, Ct. J.; Wilbur K. Miller, Ct. J., dissenting), claimant, whose claim was allowed in a lesser amount than requested argued it was not given the hearing required by Section 4(h) of the International Claims Settlement Act of 1949.¹ The court held that a subsequent part of the same section precluded judicial review of a denial of claim, and that, in the absence of denial of a Constitutional right, a point not here at issue in the court's opinion, the kind of hearing was a question of law not subject to judicial review in view of the cited provision.

NOTE: In *Haas v. Humphrey*, 246 F.2d 682 (Ct. A., Dist. Col., May 16, 1957, Washington, Ct. J.; Wilbur K. Miller, Ct. J., concurring in result), it was held that, under Section 4(h) of the International Claims Settlement Act of 1949, there could be no judicial review of the dismissal of a claim of a non-national. See also *Dayton v. Gilliland*, 242 F.2d 227 (1957).

Passports—requirement of non-Communist affidavit not violative of Constitutional rights of applicant—effect of affidavit denying membership in recent years

Regulations of the State Department providing that no passport shall be issued to members of the Communist Party and those with alleged Communist associations under certain circumstances, and providing for the filing of an affidavit as to such matters, were upheld as valid in *Briehl v. Dulles*, 248 F.2d 561 (Ct. A., Dist. Col., June 27, 1957; *In Banc*, Prettyman, Ct. J.; Washington, Ct. J., concurring in result; Edgerton, C. J., and Razelon and Fahy, Ct. JJ., dissenting), noted in 51 A.J.L.L. 818 (1957) as unreported. See also *Kent v. Dulles*, 248 F.2d 600, certiorari granted 78 S. Ct. 149, 355 U. S. 881 (1957), decided on the same basis with the same division of judges on the same day. In a companion case, *Stewart v. Dulles*, 248 F.2d 602 (*Per Curiam*, July 3, 1957; Wilbur K. Miller, Danaher and Bastian, Ct. JJ., dissenting), in which the passport applicant filed an affidavit denying membership for the past fifteen years, and the State Department rejected this affidavit as insufficient compliance with the requirement for an affidavit as a prerequisite to a hearing, the court affirmed the lower court in ordering the Secretary to consider the application on its merits, following *Boudin v. Dulles*, 235 F.2d 532 (1956), noted in 51 A.J.L.L. 122 (1957).

Extradition—"offenses of a political character"—if "war crimes," nonetheless "political offenses" within treaty

Alleged war criminal brought *habeas corpus* proceeding for release from detention ordered by the Commissioner on warrant filed by the Consul Gen

¹ 22 U.S.C.A. §§ 1621-1627.

eral of Yugoslavia charging murder and seeking extradition on the basis of a 1902 treaty between the United States and Serbia.¹ A previous decision held this treaty to be in force, 211 F.2d 565. The lower court granted the writ, 140 F.Supp. 245. The Court of Appeals affirmed. *Karadzole v. Artukovic*, 247 F.2d 198 (U. S. Ct. A., 9th Circuit, June 29, 1957, Stephens, Ct. J.). The Supreme Court granted certiorari, *Per Curiam*, vacated the judgment and remanded for hearing under 18 U.S.C. § 3184, 355 U.S. 393 (U. S. Sup. Ct., Jan. 20, 1958, Black and Douglas, JJ., dissenting).

Jurisdiction of Federal District Court on civil side over airplane death on high seas—admiralty—Warsaw Convention

In *Noel v. Linea Aeropostal Venezolana*, 247 F.2d 677 (U. S. Ct. A., 2nd Circuit, Aug. 9, 1957, Lumbard, Ct. J.), the court affirmed the decision below, 144 F.Supp. 361, digested in 51 A.J.I.L. 419 (1957), later opinion on amended complaint in 154 F.Supp. 162 noted below. In diversity case on civil side, the law applicable was a Federal treaty, the Warsaw Convention,² and it creates no independent cause of action, actionability turning on the local law. Only the admiralty forum has jurisdiction over rights created by the Federal Death on the High Seas Act.³

NOTE: In *Noel v. Venezolana*, 154 F.Supp. 162 (U. S. Dist. Ct., S.D.N.Y., Nov. 29, 1956, Cashin, D. J.), the plaintiff's amended complaint alleged that death occurred on board the aircraft in airspace, and therefore outside the admiralty and within the civil jurisdiction of the court. Motion to dismiss for lack of civil jurisdiction was granted.

Habeas corpus—existence of "time of peace"—applicability of military law to offense by soldier dishonorably discharged while military prisoner

Petitioner, while serving sentence imposed by previous court-martial, committed crime of conspiracy to commit murder on June 10, 1949. Petitioner had been dishonorably discharged on June 12, 1947, after his previous court-martial. For this subsequent offense, he was convicted and sentenced to life imprisonment by court-martial. Petitioner claims (1) he was convicted in "time of peace" and (2) he was entitled to a jury trial as a "civilian" in view of his discharge. The court held "time of peace" is for the determination of the political departments, and that war had not officially ceased with respect to either Germany or Japan. The court further held that then Article of War 2 (e),⁴ which rendered amenable to military law, including military trial, "All persons under sentence adjudged by court-martial," was Constitutional, and that the *Toth*,⁵ *Covert*,⁶ and *Krueger*⁶ cases did not change this conclusion. *Lee v.*

¹ 32 Stat. 1890.

² 49 Stat. (2) 3000 *et seq.*

³ 41 Stat. 537.

⁴ 10 U.S.C.A. § 1473, now superseded by Art. 2(7) of the Uniform Code of Military Justice, 50 U.S.C.A. § 552 (7). ⁵ 350 U. S. 11 (1955).

⁶ 354 U. S. 1 (1957); 51 A.J.I.L. 783 (1957).

Madigan, 248 F.2d 783 (U. S. Ct. A., 8th Circuit, Oct. 11, 1957, Barnes, Ct. J.); certiorari granted March 17, 1958 (N. Y. Times, March 18, 1958, p. 48, col. 5).

NOTE: In *May v. Wilson*, 153 F.Supp. 688 (U. S. Dist. Ct., D. C., Feb. 10, 1956, McGarraghy, D. J.), American soldiers being tried in Japanese court for off-duty offenses under the Protocol to Amend Article XVII of the Administrative Agreement¹ sought preliminary injunction and declaratory judgment that the Protocol was void. Both were denied.

International administrative law—validation of German bonds—scope of judicial review—right to jury trial

Plaintiff, holder of German dollar bonds, had been denied validation of his bonds by the validation board, an international administrative agency established under a 1953 treaty² between the United States and the Federal Republic of Germany and related legislation. Plaintiff brought an action in a Federal District Court for a decision that his bonds met the requirements for validation, and claimed the right to a full judicial trial before the court and a jury. The court held plaintiff was entitled to a full scale independent trial but was not entitled to a jury trial. *Abrey v. Reusch*, 153 F.Supp. 337 (U. S. Dist. Ct., S.D.N.Y., March 27, 1957, Supplemental Opinion, April 12, 1957, Herlands, D. J.).

International aviation—Warsaw Convention—proper court for damage action—"doing business"

In *Winsor v. United Air Lines*, 153 F.Supp. 244 (U. S. Dist. Ct., E.D.N.Y., June 25, 1957, Byers, D. J.), jurisdiction under Article 28 of the Warsaw Convention³ was sustained on the ground the New York office was the place where much of the booking over defendant's line was done, and that it is therefore a "principal place of business," although the principal executive office is in Chicago and main operating base in Denver. The jurisdictional conclusion was said not to be free from doubt.

Admiralty—right to sue United States—reciprocal right to sue foreign government—proof of foreign law

Libel by owner of Greek merchant vessel against United States for damages from collision with U. S. Naval vessel. Libellant alleged that a U. S. citizen owning vessel colliding with Greek public vessel could sue the Greek Government for collision damage in the Greek courts, and therefore the conditional waiver of sovereign immunity under 46 U.S.C.A. § 781 *et seq.* was available. The United States denied this allegation. The court held, on the basis of expert and documentary evidence, that the condition of reciprocity had been met and that it therefore had jurisdiction. *Nicolas Eustathion & Co. v. United States*, 154 F.Supp. 515 (U. S. Dist. Ct., E.D., Va., Sept. 10, 1957, Walter E. Hoffman, D. J.).

¹ T.I.A.S., No. 2848.

² T.I.A.S., No. 2794.

³ 49 Stat. (2) 3000 *et seq.*

Interpleader—authority of Estonian bank—requirement of personal service where practical

Action by refugee officials of Estonian bank for bills and deposit made in American bank prior to Soviet occupation of Estonia. American bank sought interpleader against Soviet bank, refugee officials, and unknowns who sent "tested" cable demanding transfer to Soviet bank after Soviet occupation. The court granted interpleader and directed personal service, wherever practical, even if abroad. *A/S Krediid Pank v. Chase Manhattan Bank*, 155 F.Supp. 30 (U. S. Dist. Ct., S.D.N.Y., Sept 18, 1957, F. van Pelt Bryan, D. J.).

Evidence—discovery against foreign non-parties—letters rogatory for examination of witnesses and production of documents relating to pre-trial phase of suit pending before foreign court

Radio Corporation of America brought suit in a United States District Court against Rauland Corporation and another for patent infringement. Defendants counter-claimed, alleging that plaintiff was a party to an international conspiracy in restraint of trade and in violation of United States antitrust laws rendering its patents unenforceable. In the pre-trial phase of the case the District Judge issued letters rogatory at the defendant's request to the appropriate courts of Canada, England, and three other European countries for the examination of certain witnesses not parties to the original suit and for the discovery of documents in the possession of those witnesses. From an order of a Canadian court denying leave to examine the witnesses or produce the documents, an appeal was taken.

The Ontario High Court, Gale, J., affirmed the result below in *Re Radio Corp. v. Rauland*, [1956] 5 D.L.R. (2d) 424. In this case, some of the desired evidence was stated to be relevant to the trial of the issue, though, as in the English case noted below, none of those requested to produce evidence was a party to the suit in the United States. Notwithstanding the relevancy of the material and the court's stated wish not to impede the principal suit, the request by defendants was denied as being too broad and vague under section 42 of the Canada Evidence Act. A request merely reciting the words of the Act, asking for discovery of evidence "relating to the matter in question . . ." is not precise enough to apprise those affected by the order of what is required of them. The Act could not be construed to authorize persons in Ontario to undergo a broader form of inquiry in relation to an action pending in a foreign court than to one conducted locally. Leave was granted defendants to re-apply to the court for an order calling for production of specified or identified evidence. A question of privilege was reserved for the Commissioner's determination upon defendants' re-application.

NOTE: In *Radio Corp. of America v. Rauland Corp.*, [1956] 1 All E.R. 549, digested in 51 A.J.I.L. 115 (1957), the Queen's Bench, reversing in part an intermediate opinion, [1956] 1 All E.R. 260, held that the examina-

tion requested by defendants was not authorized under the true construction of section 1 of the Foreign Tribunals Evidence Act, 1856.

Conflict of laws—host-guest automobile action—recovery allowed though suit non-actionable in foreign situs of the accident

In *Morris v. Angel*, [1956] 5 D.L.R. (2d) 30, plaintiffs were injured in an automobile accident occurring in the State of Washington while riding as guests of the defendant. Recovery was sought in the Supreme Court of British Columbia, in which Province all parties were domiciled.

Whitaker, J., following the decision in *McLean v. Pettigrew*, [1945] 2 D.L.R. 65, stated and applied the conditions set forth in *Corr v. Francis Times & Co.*, [1902] A.C. 176, 182; namely, that the wrong must be actionable in the jurisdiction in which suit is brought, and "the act must not have been justifiable by the law of the place where it was committed." The court found that defendant had been guilty of gross negligence in having failed to yield right-of-way at an intersection, hence had committed an actionable wrong under the law of British Columbia. The defendant argued that although the first condition had been met, the second had not been, since a suit by a guest may not be maintained against a host in the State of Washington unless intentional injury is proven. Rejecting this contention, the court found that even though no intentional injury had been shown, defendant's negligence was punishable as an offense against Washington law and, thus, was not legally justified within the meaning of the second condition.

Divorce—foreign decree

In *Robinson-Scott v. Robinson-Scott*, [1957] 3 All E.R. 473 (United Kingdom, Probate, Divorce and Admiralty Div., Nov. 6, 1957, Karmirski, J.), a wife, after a marriage and honeymoon in Switzerland, at no time joined her husband in England where he was domiciled. She later instituted proceedings for divorce in Zurich, which was granted under the law of the district permitting the court to acquire jurisdiction on a showing of three years' residence by the wife, despite the fact that the husband's domicile remained in England. In a proceeding instituted in England by the husband, it was held that an English court would recognize as valid a divorce decree granted by a Swiss court to a wife who had resided there for three years, even though the Swiss court founded its jurisdiction on a ground not recognized by English law, since the English court would have accepted jurisdiction on proof of a three-year residence in England.

Nationalization of Czechoslovakian bank—appointment of permanent receiver for New York assets

The decision below, appointing a receiver, noted in 51 A.J.I.L. 432 (1957), was unanimously affirmed in the Appellate Division, 157 N.Y.S. 2d 904 (1956), and was similarly affirmed in a memorandum decision by the Court of Appeals. *Stephen v. Zivnostenska Banka*, 3 N.Y. 2d 862, 166 N.Y.S. 2d 309 (1957).

Testamentary trust—cy pres doctrine

Testator's residuary estate was placed in trust with directions to use the funds to send American citizens to study in the Armenian University in the Armenian S.S.R. Purpose was to create understanding between American and Armenian peoples. On application, the Surrogate held the existing international situation prevented literal compliance but that, under the *cy pres* doctrine, fund could be used for scholarships at centers of Armenian culture outside the "iron curtain" countries. *In Re Armenian's Estate*, 166 N.Y.S. 2d 1006 (Surrogate's Court, N. Y. County, Aug. 8, 1957, Di Falco, S.).

AMERICAN CASES ON ENEMY PROPERTY AND TRADING WITH THE ENEMY

Ercona Camera Corp. v. Brownell, 246 F.2d 675 (Dist. of Col. Cir., May 16, 1957), procedural rulings approved; *Straehler v. Brownell*, 246 F.2d 675 (Dist. of Col. Cir., June 13, 1957), findings below sustained; *Landes v. Humphrey*, 246 F.2d 703 (Dist. of Col. Cir., June 13, 1957), procedure formulated under Act for purpose of excluding cinnamon originating in China approved; *Kaufman v. Brownell*, 247 F.2d 553 (Dist. of Col. Cir., June 20, 1957), intervenors entitled to enjoin, pending ascertainment of their rights, sale of only their proportionate share and not all of corporate assets; *Grabbe v. Brownell*, 247 F.2d 402 (2d Cir., July 30, 1957), 1954 Amendment extended time to file for administrative relief, but not for suit against U. S.; *GMO. Niehaus & Co. et al. v. U. S.*, 153 F.Supp. 428 (Ct. Claims, July 12, 1957), "enemy" can recover illegally seized property despite Trading with Enemy Act; *Klein v. Brownell*, 155 F.Supp. 586 (E.D.N.Y., Oct. 30, 1957), U. S. citizen, who voluntarily acquired and assumed permanent residence in Germany, an "enemy" within Act.

AMERICAN CASES ON NATIONALITY

Citizenship. U. S. ex rel. Lee Kum Hoy et al. v. Murff, 78 S. Ct. 203, 355 U. S. 169 (Dec. 9, 1957), inaccurate blood grouping tests; *Chow Bing Kew v. U. S.*, 248 F.2d 466 (9th Cir., May 20, 1957), *in personam* jurisdiction lacking, where indictment omitted alien's name, but "wilfully," required by statute, not required in indictment if evil purpose is shown; *Dulles v. Richter*, 246 F.2d 709 (Dist. of Col. Cir., June 17, 1957), foreign birth after citizen father enlisted in Bavarian Army; *Paris v. Shaughnessy*, 247 F.2d 1 (2d Cir., July 2, 1957), "savings clause" did not save alien who became ineligible for citizenship, although not deportable prior to 1952 Act; *Barber v. Rietmann*, 248 F.2d 118 (9th Cir., Sept. 13, 1957), another savings clause case; *In Re Skender's Petition*, 248 F.2d 93 (2d Cir., Sept. 6, 1957), effect of draft exemption as a "neutral alien" granted 9 days after alien's country became ally; *U. S. v. Kenny*, 247 F.2d 139 (2d Cir., August 8, 1957), denial of citizenship to alien National Guard member who had applied for draft exemption on grounds of "alienage"; *Louie Hoy Gay v. Dulles*, 248 F.2d 421 (9th Cir., Sept. 12, 1957), sufficiency of evidence, admissibility of alleged father's immigration file; *Wong Moon Jee v.*

Dulles, 248 F.2d 951 (1st Cir., Oct. 25, 1957), finding of non-citizenship affirmed; *Ng Gim Nun v. Dulles*, 154 F.Supp. 898 (S.D.Ga., May 13, 1957), plaintiff's father a citizen residing in U. S. prior to plaintiff's Chinese birth; *Get v. Dulles*, 154 F.Supp. 577 (E.D.N.Y., July 11, 1957), sufficiency of evidence, including blood grouping, established foreign-born minor as U. S. citizen's son; *In Re Carvahal*, 154 F.Supp. 525 (N.D.Calif., July 16, 1957), effect of 1952 Act on "treaty alien" who applied for relief from military service because of alienage; *Petition for Naturalization of B.*, 154 F.Supp. 633 (D.Md., Sept. 18, 1957), standards for establishing "good moral character"; *Tin Mew Lee v. Dulles*, 155 F.Supp. 708 (D.Hawaii, Nov. 15, 1957), evidence required to show denial of rights and privileges as national under statute.

Deportation. *Rowoldt v. Perfetto*, 78 S.Ct. 180, 355 U. S. 115 (Dec. 9, 1957), noted *supra*, p. 344; *Karayanis v. Brownell*, 248 F.2d 80 (Dist. of Col. Cir., June 6, 1957), effect on alien who secured non-quota visa of subsequent annulment for fraud of marriage to citizen; *Boulemandis v. Brownell*, 247 F.2d 83 (Dist. of Col. Cir., June 13, 1957), effect of voluntary departure from U. S. on eligibility for suspension of deportation; *Gutierrez-Sosa v. Del Guercio*, 247 F.2d 266 (9th Cir., June 21, 1957), alien, who was adulterer prior to 1952 Act, ineligible for voluntary departure; *Barber v. Lal Singh*, 247 F.2d 213 (9th Cir., June 24, 1957), meaning of "proceeding" in savings clause with reference to determination under Act of 1917; *Nani v. Brownell*, 247 F.2d 103 (Dist. of Col. Cir., June 27, 1957), affirming 153 F.Supp. 679 (D.C., March 27, 1957), alien not notified proceedings against him referred to Attorney General, due process; *Quan v. Brownell*, 248 F.2d 89 (Dist. of Col. Cir., June 27, 1957), Attorney General's discretionary power to withhold deportation of aliens within U. S. on parole basis; *Wei v. Robinson*, 246 F.2d 739 (7th Cir., June 28, 1957), alien's refusal to leave U. S. upon completing military training; *Tseung Chu v. Cornell*, 247 F.2d 929 (9th Cir., July 11, 1957) conviction under tax evasion statute as crime involving "moral turpitude"; *Yiannopoulos v. Robinson*, 247 F.2d 655 (7th Cir., Aug. 23, 1957), lack of reasonable substantial and probative evidence to support order; *U. S. v. Holton*, 248 F.2d 737 (7th Cir., Oct. 2, 1957), proper discretion by Attorney General under statute forbidding alien's deportation to any country where he would be subject to physical persecution; *Olimpius v. Butler*, 248 F.2d 169 (4th Cir., Oct. 7, 1957), evidence below sufficient for order; *Lehmann v. U. S.*, 248 F.2d 519 (6th Cir., Oct. 14, 1957), effect of savings clause on previous offenses; *In Re Petition of Terzich*, 153 F.Supp. 651 (W.D.Pa., July 26, 1957), collateral attack on final administrative deportation order not permissible; *Sigurdson v. Del Guercio*, 154 F.Supp. 220 (S.D.Calif., July 26, 1957), after proceedings judicially reviewed through *habeas corpus*, alien could not subsequently maintain declaratory relief action; *In re Moyal's Naturalization*, 154 F.Supp. 556 (E.D.Pa., Aug. 12, 1957), Pennsylvania marriage after British divorce (adultery) to co-respondent in divorce not sufficient evidence of bad moral character even though such marriage is invalid in Pennsylvania, since most States permit it; *Quintana v.*

Holland, 154 F.Supp. 640 (E.D.Pa., Sept. 16, 1957), Congress' rescission of status adjustment and withdrawal of deportation suspension more than 5 years after adjustment upheld.

Naturalization. In Re Carnavas, 155 F.Supp. 12 (S.D.N.Y., Sept. 23, 1957), petitioner for naturalization, who filed application prior to expiration of 1940 Act, entitled by savings clause to pursue course even though petition now would be invalid under 1952 Act, and even though petitioner was illegally in United States at time of application and thereafter.

Denaturalization. U. S. v. Matles, 247 F.2d 378 (2d Cir., June 10, 1957), civil nature of denaturalization and self-incrimination; *U. S. v. Lucchese*, 247 F.2d 123 (2d Cir., June 17, 1957), affidavit of good cause may be filed after complaint; *U. S. v. Costello*, 247 F.2d 384 (2d Cir., July 22, 1957), even if Government's affidavit invalid because of illegal wire taps, it should have been permitted to file new affidavit, admissibility of 1925 and 1926 wire-taps, and 1943 wire-tap without Federal connivance; *U. S. v. Matles*, 154 F.Supp. 574 (E.D.N.Y., July 11, 1957), availability to defense of reports of Government witnesses relating to their testimony; *U. S. v. Pellegrino*, 155 F.Supp. 726 (S.D.N.Y., Sept. 26, 1957), summary judgment denied when substantial fact issue as to intent to deceive by defendant.

Passport. Briehl v. Dulles, 248 F.2d 561 (Dist. of Col. Cir., June 27, 1957), *Kent v. Dulles*, 248 F.2d 600 (Dist. of Col. Cir., June 27, 1957), *Stewart v. Dulles*, 248 F.2d 602 (Dist. of Col. Cir., July 3, 1957), all noted *supra*, p. 345.

Miscellaneous. Amaya v. U. S., 247 F.2d 947 (9th Cir., June 25, 1957), non-disclosure of informer in trial arising out of assault on immigration officer upheld; *Vega-Murrillo v. U. S.*, 247 F.2d 735 (9th Cir., July 5, 1957), validity of indictment for illegal transportation of aliens; *Chien Fan Chu v. Brownell*, 247 F.2d 790 (Dist. of Col. Cir., July 18, 1957), meaning of place of "last residence" under Refugee Relief Act; *Savelis v. Vlachos*, 248 F.2d 729 (4th Cir., Oct. 7, 1957), validity of detention of alien seaman by immigration authorities; *Reidy v. Comerford*, 166 N.Y.S. 2d 748 (Sup. Ct., Spec. Term, Oct. 22, 1957), naturalized citizen who had previously voted at general election met registration requirements without proof of naturalization.

RECENT SIGNIFICANT GERMAN DECISIONS *

Political division of Germany—age of majority of a refugee from the Soviet Zone

The plaintiff was born in the Soviet Zone of Germany and domiciled there when he reached the age of majority (18 years) under the law of the German Democratic Republic. Soon thereafter he fled to Western Germany, where he was recognized as a political refugee. When a West

* Prepared by M. Magdalena Schoch, of the U. S. Department of Justice. Space permits only the printing of decisions of the Federal Constitutional Court in this issue. Subsequent issues will carry other German decisions as well as some Austrian cases.—Ed.

German court in a civil proceeding issued a writ of execution against him, he attacked the validity of the writ on the grounds that he was a minor according to the West German Civil Code (i.e., under 21 years) and that applying the rule of the Soviet Zone to him constituted a discrimination "for reason of birthplace and origin," which violated Article 3, pars. 1 and 3, of the Basic Law. The Federal Constitutional Court dismissed his appeal for the following reasons: The lower courts applied, by way of analogy, the general rule of the Introductory Law to the Civil Code, according to which a person who has attained majority under the national law does not lose this status upon becoming a German citizen, even if under German law he would still be a minor. From this provision they derived the general conflicts rule that the status of majority, once acquired, cannot be lost as a result of a change of domicile into a jurisdiction where the age of majority is higher. This is not discrimination by reason of birthplace or origin—quite apart from the question whether earlier majority can be regarded as a disadvantage or whether it should not be looked upon as a status carrying both disadvantages and benefits. Federal Constitutional Court, First Division, May 25, 1956 (1 BvR 83/56). 5 *Entscheidungen des Bundesverfassungsgerichts* 17.

Political division of Germany—continued domicile in Western Germany as a requirement for member of Parliament

Federal Deputy Karlfranz Schmidt-Wittmack moved from Hamburg into the Soviet Sector of Berlin, where he accepted a public office. The Federal Parliament declared that he had forfeited his seat since he had lost his eligibility under the Federal Election Law. The ex-deputy filed a complaint in the Federal Constitutional Court on the grounds that, under the Election Law, domicile in Western Germany was required to exist at the time of election only, and that moreover he still considered Hamburg as his domicile. The Court dismissed the complaint. The decision explains that in view of the *de facto* division of Germany, citizenship was not sufficient to qualify a person for a seat in Parliament (as had been the case under the Weimar Constitution); the Election Law had established the additional requirement of domicile within the Federal Republic or in the "Land Berlin," meaning the Western sectors of Berlin; the loss of such domicile must result in the loss of eligibility. The Court found as a fact that plaintiff had given up his domicile in Hamburg; any intention he might have to return there at some indefinite time in the future was irrelevant. Federal Constitutional Court, First Division, May 31, 1956, (1 BvR 1/55). 5 *Entscheidungen des Bundesverfassungsgerichts* 2.

The Potsdam Agreement and the German Communist Party—suppression of the Communist Party and reunification of Germany

Upon the application of the Federal Government, the Federal Constitutional Court declared that the German Communist Party was subversive within the meaning of Article 21 of the Bonn Constitution. (Article 21,

par. 2, provides: "Parties which according to their aims and the conduct of their members seek to impair or abolish the free and democratic basic order or to jeopardize the existence of the Federal Republic of Germany shall be unconstitutional.") It ordered the Communist Party dissolved and its property forfeited to the Federal Republic; and it prohibited the formation of any successor or substitute organization. The decision, which takes up more than 300 printed pages, contains a thorough analysis of Communist tactics and aims on an historical basis. From the viewpoint of international law the discussion of two arguments of the Communist Party is of interest. The Party argued that the suppression would violate the Constitution, inasmuch as it prevented the reunification of Germany, since it made it impossible to hold free elections throughout Germany, which were an indispensable precondition of reunification. The Court affirmed that the Preamble to the Constitution placed a duty upon all organs of the Government to strive toward reunification and to refrain from any measures which might impede reunification. But, it pointed out, reunification is not only an internal German affair but an international problem, which cannot be solved without an agreement among the occupying Powers; any measure which they would adopt in future would supersede a court decision suppressing the Communist Party. Moreover, suppression now does not necessarily mean that the Communist Party cannot be admitted to participation in all-German elections when the time for reunification has come (pp. 125-133). The defendant Party also relied on the Potsdam Agreement for the argument that the Constitutional provision could not apply to political parties which were licensed as "democratic parties" by the military governments of the occupying Powers in the immediate postwar period. The Court explained that, in the light of the general political situation at the time of the Potsdam Agreement, the Allies chose the term "democratic" in the sense of "anti-national-socialist"; that the subsequent breakdown of the Allied Control Council was due precisely to a lack of agreement on "democratic" principles; and that, moreover, the licensing rights of the Military Governments in the Western Zone were abrogated in 1950 in full knowledge of the provisions of Article 21 of the Bonn Constitution (pp. 113-125). Federal Constitutional Court, First Division, Aug. 17, 1956 (1 BvB 2/51). 5 *Entscheidungen des Bundesverfassungsgerichts* 86.

Supreme Restitution Court—decisions not subject to Constitutional review

The Supreme Restitution Court affirmed a decision of a German court in a restitution matter. The losing party attempted to attack the decision on Constitutional grounds in the Federal Constitutional Court. The Court held that Constitutional review is inadmissible where the decision attacked has been affirmed by the Supreme Restitution Court, which, upon termination of the occupation regime, took the place of the American Court of Restitution Appeals (CORA), the Supreme Restitution Court for the British Zone, and the Higher Court of Restitution for the French

Zona (Chapter III, Article 6, of the Convention on the Settlement of Matters Arising out of the War and the Occupation, and Annex). These latter courts rested upon occupation law; their decisions were public acts of the occupying Powers, and hence not reviewable by the Federal Constitutional Court. The Supreme Restitution Court is likewise outside the German judicial organization; the jurisdiction which it exercises is not a manifestation of German public authority. It is a court created jointly by the participating Powers through an international treaty. Its international character is evident in the composition of the court: each division has a presiding judge who may be neither a German national nor a national of one of the three other Powers, two German judges, and two judges who are nationals of one of the three Powers. The non-German judges are entitled to diplomatic privileges and immunities; their salaries are paid by their respective governments. In disputes over the jurisdiction of the Supreme Restitution Court an arbitral tribunal decides with binding effect on all German courts and authorities. Federal Constitutional Court Ruling of Nov. 6, 1956 (1 BvR 273/56). 12 *Juristenzeitung* 55 (N. 1) (1957).

German assets in Switzerland—Washington Accord—German-Swiss Agreement of 1952 held not to violate individual rights guaranteed in the Basic Law

On August 26, 1952, Germany and Switzerland entered into three agreements for a general financial settlement: (1) Agreement on German Assets in Switzerland (*Bundesgesetzblatt* 1952, II, 17); (2) Agreement on Settlement of Claims of Switzerland against Germany (*id.* 22); (3) Agreement on Most-Favored-Nation Treatment of Swiss Citizens in the Equalization of Burdens Program (*id.* 24). They became effective on March 7, 1953 (*Law* of March 7, 1953 (*BGBI.* II, 15)). The first two agreements were tied with the Allied-Swiss Agreement of August 28, 1952, concerning German assets in Switzerland. In that Agreement Switzerland obligated herself to pay Sw. Fr. 121,500,000 by way of reparations, which amount it was to receive from the German Government; upon payment of the amount, the provisions of the Washington Accord of 1946, which called for the total liquidation of German assets in Switzerland and the division of the proceeds in equal shares between Switzerland and the Allied Government, were to cease to have effect with regard to German assets in Switzerland owned by residents of the Federal Republic and West Berlin. The Swiss-German Agreement (1) provided that payment of the reparation amount called for by the Swiss-Allied Agreement was to be financed primarily from "contributions" payable by German owners of property in Switzerland to the German Government, which amount to one third of the value of their assets. Payment of the "contribution" is a condition for the release by Switzerland (assets up to 10,000 francs were released unconditionally), and it relieves the owner of payment of the capital levy which he would otherwise have to pay under the Equalization of Burdens Law. The assets of owners who fail or refuse to pay the "contribution" will be

liquidated by Switzerland, and the proceeds paid over to the German Government, which pays the amount in German currency to the owner. The owner remains liable for the equalization levy; those owners who are not subject to the Equalization Law must pay one third of the value as a substitute for the levy. The Federal Republic waived in its own behalf and in behalf of its nationals any objections to the liquidation of German assets in Switzerland (Art. 10, par. 1).

Plaintiff, a German national and resident, who owned a small piece of real property in Switzerland and who had been totally bombed out in Germany, paid the required "contribution" in order to avoid liquidation of the property in Switzerland. He asked the Constitutional Court to declare null and void the German law concerning the three Swiss-German Agreements (see *supra*) and the Agreement on German Assets in Switzerland, on the grounds that they violated the Constitutional guarantees of private property (Article 14 of the Basic Law) and equality before the law (Article 3) as well as general principles of international law on the inviolability of private property. He argued that the Agreement and the law putting it into effect amounted to a partial expropriation without compensation by the Federal Republic; that the conclusion of the Agreement was not in the public interest, since Switzerland was unwilling to carry out the Washington Accord anyway; and that therefore there was no serious danger that Switzerland would proceed with the liquidation of German assets.

The complaint was dismissed. The Federal Constitutional Court held that the Agreement on German Assets was called for in the public interest, for the protection of German property in Switzerland, which otherwise might have been liquidated *in toto*. Switzerland regards the liquidation of German assets as a form of compulsory clearing; she is determined to carry out the Washington Accord as soon as the question of compensation of the owners is settled; nor were the Allies willing at any time to waive their rights under the Accord. "Through the Agreement the Federal Government achieved a complete release of patents and trademarks and of properties up to 10,000 francs, considerable concessions on the part of Switzerland in the question of clearing claims, and the possibility for owners of assets above 10,000 francs to obtain release of their property, even though with certain sacrifices."

The liquidation proceeds must be regarded as just compensation within the meaning of the Constitutional provision. The substitute levy on the liquidation proceeds does not constitute expropriation without compensation nor does it violate equality before the law:

Where the substitute capital levy is higher than the equalization-of-burdens levy imposed upon property within Germany, such differentiation is justified by the nature of things. Foreign assets as compared to domestic assets are subject to special chances and special risks varying from country to country. Therefore a special treatment of such assets within certain limitations, which were by no means exceeded here, is not arbitrary in the context of equalization of burdens. (p. 299.)

Plaintiff would not have been injured in his Constitutional rights even if he had risked the liquidation of his property by Switzerland. The injury was he injured when he made use of the opportunity to prevent such liquidation by paying the contribution provided for in the law. Nor does Article 10, paragraph 1, deprive plaintiff of any property rights. This case means that the German Government will not grant German owners of assets in Switzerland diplomatic protection in matters concerning such assets. In making the Agreement the German Government did not neglect its duty to protect German owners but rather acted in their interest. It is true that the Swiss Federal Court has held that Article 10, paragraph 1, also deprived the German owners of the right to object to liquidations (decision of July 12, 1955, 81 BGE II, 366). But even under this view no rights of plaintiff are violated, since he had no right prior to the Agreement to protest against liquidation or to assert a claim for compensation beyond the liquidation proceeds under Swiss law. Since Article 14 of the Basic Law was not violated by the Agreement, it follows that the Agreement did not violate any general rules of international law, for there are no known principles of international law which safeguard private property in a measure exceeding the provisions of Article 14. Federal Constitutional Court, First Division, March 21, 1957 (1 BvR 65/54, 6 *Entscheidungen des Bundesverfassungsgerichts* 290.

Concordat of 1933—continued in effect but not binding on the States in exclusive State matters

The Federal Government sought a decision of the Federal Constitutional Court setting aside certain provisions of the 1954 school legislation of the State of Lower Saxony, which it alleged violated the school provisions of the Concordat which the Hitler Government concluded with the Vatican on July 20, 1933. (While that legislation was in the draft stage the Apostolic Nuncio had voiced objections against certain provisions to the Federal Government, which had communicated them to the State Government.) The Federal Government argued that the Concordat was still in effect and that it was binding on the States under Article 123, paragraph 2, of the Basic Law, which provides:

The international treaties concluded by the German Reich concerning matters which under this Basic Law are within the legislative jurisdiction of the States, remain in force if they are valid and continue to be valid in accordance with general principles of law, subject to all rights and objections of the interested parties, pending the conclusion of new international treaties by the authorities competent under this Basic Law or until they are otherwise terminated pursuant to the provisions which they contain.

The State of Lower Saxony argued, first, that the controversial provisions were not incompatible with the Concordat, and, second, that the Federal Government had no right to demand that States comply with the school provisions of the Concordat, since the States had exclusive legislative jurisdiction in matters of education (Article 70 *et seq.* of the Basic Law). The

States of Hesse and Bremen, which joined as defendants, argued, *inter alia*, that the Concordat was not concluded Constitutionally, as it was concluded under the so-called Enabling Act of March 24, 1933; that it had not survived the National Socialist regime; and that it was in contradiction to the Basic Law of the Federal Republic.

The Court decided against the Federal Government. It held that international treaties made by the National Socialist regime under the Enabling Act must be deemed valid even though the Enabling Act was invalid under the Weimar Constitution. The school provisions of the Concordat became German law through publication in the Official Law Gazette (*Reichsgesetzblatt*) and through the law authorizing the Reich Minister of the Interior to issue the necessary implementing provisions. The repeated violations of the Concordat by the National Socialist Government and the National Socialist Party did not abrogate the treaty nor was it ever canceled by either party or rendered obsolete by non-observance. The Concordat remained in effect after the collapse in 1945. The occupying Powers did not, and could not, abrogate it, although the British Military Government "suspended" it temporarily. The suspension of all international treaties of the German Reich (by Directive No. 6 of the Allied High Commission) until reinstated by agreement with the other party and with the consent of the Allied High Commission could refer only to treaties with former enemies. The Federal Republic is identical with the former German Reich, hence bound by international treaties concluded by the Reich; this is provided in Article 123, paragraph 2, of the Basic Law. Consequently the obligations under the Concordat must be fulfilled by the parties thereto. The Federal Republic, however, is unable to fulfill them since it has no power to enact school legislation. Nor can it compel the States to comply with the Concordat. Article 123, paragraph 2, provides merely for the continued effectiveness of municipal law based upon a treaty made by the German Reich, but it does not prevent the States from changing such law if it is within their legislative powers under the Basic Law. A contrary result would seriously violate the federalist organization of the Federal Republic. Federal Constitutional Court, Second Division, March 26, 1957 (2 BvG 1/55). 6 *Entscheidungen des Bundesverfassungsgerichts* 309.

German Constitution—status of Berlin—reservation of Military Governors, 1949—Constitutionality of Berlin laws not reviewable by Federal Constitutional Court

A lower court submitted to the Federal Constitutional Court a question concerning the constitutionality of a law of Greater Berlin (West Berlin). The Court denied its jurisdiction, summarizing its opinion as follows:

Berlin is a State (*Land*) of the Federal Republic of Germany. The Basic Law is effective in and for Berlin to the extent that its application is not restricted by measures of the Three Powers which originated in the period of occupation and which are still in force today. The reservation stated by the Military Governors in their approval of the

Basic Law precludes any organs of the Federal Republic from exercising over Berlin any direct sovereignty in the broadest sense, including court jurisdiction, unless the Three Powers have in the meantime approved of such exercise of sovereignty in specific fields. Since such an exception has not been made heretofore with regard to the Federal Constitutional Court, this Court is at the present time incompetent to decide the question of compatibility of Berlin laws with the Basic Law upon submission by a lower court.

The Court explained that Article 23, first sentence, of the Basic Law defines the territory in which the Basic Law is to apply for the time being and expressly names the territory of Greater Berlin. Article 127 authorizes the Federal Government to put into effect laws of the Bizonal Economic Administration in Greater Berlin as well as the States in the Frontier Zone, subject, however, to restrictions which the Three Powers may impose (see Article 144, paragraph 2, of the Basic Law). Such a restriction is found in the Letter of Approval of the Military Governors, dated May 12, 1949 (for complete text, see Documents on the Creation of the German Federal Constitution, Prepared by Civil Administrative Division, Office of Military Government for Germany, 1949, page 138), where it is said:

1. A third reservation concerns the participation of Greater Berlin in the Federation. We interpret the effect of Articles 23 and 117 para. 2 of the Basic Law as acceptance of our previous request that while Berlin may not be accorded voting membership in the Bundesversammlung or Bundesrat nor be governed by the Federation she may, nevertheless, designate a small number of representatives to attend the meetings of those legislative bodies.

This reservation was maintained in Article 2 of the Convention on Relations between the Three Powers and the Federal Republic. Its interpretation has been controversial, especially with regard to the clause that Berlin may not be "governed" by the Federation. The Allied High Commission took the position that Berlin is not a "State" of the Federal Republic and accordingly nullified certain provisions of the Federal Law concerning the Position of Berlin in the Financial System of the Federal Republic of January 4, 1952 (BGBl. I, 1) which were incompatible with this view (see Notice of the Federal Minister of Finance, January 31, 1952, BGBl. I, 115). In view of the legislative history of the Basic Law which was influenced by the fact of military occupation, and subsequent developments which have strengthened the ties between the Federation and Berlin, this Court cannot follow the view which denies Berlin the status of a State of the Federation.

Under the reservation of the Three Powers, Federal legislation does not extend to Berlin; it must be expressly adopted by the Berlin legislature. The Berlin legislature attempted to adopt the Law concerning the Federal Constitutional Court (see *Drucks. des Abgeordnetenhauses von Berlin* No. 1300/52) but the Allied Kommandatura protested in a letter of December 20, 1952 (BK/O (52) 35), saying that the proposed extension of the jurisdiction of the Constitutional Court to Berlin violated the reservations laid down in the Letter of Approval of the Military Governors. The jurisdic-

tion of the Federal Constitutional Court over Berlin, independently of Berlin legislation, is provided in Article 166 of the Law concerning the Federal Constitutional Court to the extent that the Basic Law is in effect in Berlin. The reservation of the three Powers prevents the Court from exercising jurisdiction over Berlin if its decision constitutes the exercise of "governmental" power over Berlin. There is agreement that, in Anglo-American usage, "to govern" includes the activities of courts. The fact that the occupying Powers did not prevent Berlin from adopting the Federal legislation on court procedure and that consequently the highest Federal courts decide final appeals from Berlin courts, cannot sustain the argument that the Federal Constitutional Court has jurisdiction over Berlin. For the Constitutional position and function of the Constitutional Court is entirely different from that of the other highest courts. Its decisions would directly interfere with the legislature and the executive of Berlin, so that Berlin would be "governed" by a Constitutional organ of the Federation in an eminently political sense. Federal Constitutional Court, Ruling of May 21, 1957 (2 BvL 6/56). 10 *Neue Juristische Wochenschrift* 1273 (No. 35, 1957).

BOOK REVIEWS AND NOTES

International Law Reports. Edited by Sir Hersch Lauterpacht. 1950. London: Butterworth and Co., 1956. pp. xxviii, 460. 70 s.; 1951: pp. xlv, 74; 1952: pp. xl, 651; 1953: pp. xl, 693; 1954: pp. xxxvi, 592. Butterworth and Co., 1957. Tables of Cases. Indexes. 80 s. each.

Here at last is the start of an *International Law Reports* series which will provide judges and practitioners, legal advisers of Foreign Offices and scholars with relatively complete texts, rather than mere digests, of current decisions of national and international courts relating to international law. For many years grateful users of the *Annual Digest and Reports of Public International Law Cases* have hoped for two things: more complete reports approaching the verbatim texts of the decisions themselves and the narrowing of the time lag between the date of publication and the year of the reports.

The latter hope has been handsomely fulfilled with the aid of a grant from the Ford Foundation. The 1948 and 1949 *Annual Digests* appeared in 1953 and 1955 respectively.¹ The first volume in the newly named series—*International Law Reports, 1950*—appeared in 1956 and the volumes for 1951, 1952, 1953 and 1954 were published in 1957. The volumes for 1955 and 1956 are scheduled for publication in 1958 and thereafter it is hoped to have the *Reports* published as early as is compatible with the difficulties of collection, translation and editing of the cases. Perhaps no one who has not collaborated with Judge Lauterpacht in this undertaking can fully appreciate the difficulties involved. It is of inestimable value to have judicial decisions which are written in so many languages available in English—one of the official and working languages of the International Court of Justice and of the United Nations.

A gradual shift from digests of cases to more complete reports was initiated by Judge Lauterpacht even before the change in title of the series. In *International Law Reports*, the custom is continued of dividing the materials of each case into "The Facts" and "Held." This method of presentation has always seemed somewhat artificial to the reviewer, but it is an aid to ready reference. Comparison of a number of cases reproduced with the original law reports reveals that the Editor and his collaborators replace portions of the reports with summaries and omit portions of the opinions which they do not consider important. (For example, the detailed submissions and conclusions of the Agent of the United Kingdom in the *Anglo-Norwegian Fisheries Case*, [1951] I.C.J. Reports 119-123, are omitted in *International Law Reports, 1951*.) In these respects, the *International Law Reports* fall short of a genuine international law reporter series. However, great care has been exercised in editing the

¹ See review in 50 A.J.I.L. 976 (1956).

cases to include matters relevant to the issues decided and verbatim texts or literal translations of passages bearing on international law. In fact, many of the cases appear to be fully reported. Moreover, one can forgive a certain amount of editing in the pleasure of having readily available such fare as Lord Asquith of Bishopstone's award in *Petroleum Development, Ltd. v. Sheikh of Abu Dhabi*; Professor Georges Sauser-Hall's award in the *Gold Looted by Germany from Rome*; the Aden, Italian and Japanese cases involving Anglo-Iranian oil; and, in sum, almost all of the foreign-language decisions in the volumes.

Since it is impossible in the space of a review to assay the legal implications of more than 3000 pages of international law cases, the reviewer yields to the temptation to indulge in some political arithmetic. The five volumes under review print 17 decisions or opinions of the International Court of Justice and 71 decisions of other international tribunals, including international arbitral tribunals and the Administrative Tribunal of the United Nations. Decisions of national courts on questions of international law provide an interesting pattern. Over the five-year period, the following numbers of cases are reported by country: Argentina (11); Australia (6); Austria (40); Belgium (49); Brazil (2); Burma (2); Canada (10); Ceylon (2); Chile (4); Colombia (1); Denmark (3); Egypt (6); Eire (1); England and the British Commonwealth (59); France (101); Germany (59); Greece (11); Holland (100); India (29); Israel (51); Italy (46, not including cases for 1953 and 1954 which will appear later); Japan (4); Jordan (1); Luxembourg (7); Mexico (11); New Zealand (2); Norway (18); Pakistan (6); Peru (1); Philippines (12); Sweden (5); Switzerland (26); South Africa (22); Thailand (1); United States (190); Venezuela (11).

Here is where we are getting our decisions of national courts dealing with questions of international law. What about the 47 Members of the United Nations not included in the above list? While no decisions may have been rendered in some countries, with others it is a question of extending the coverage of national contributions. Comparison of the French decisions reported in the 1954 *International Law Reports* with those noted for 1954 in the 1955 *Annuaire Français de Droit International* (pp. 533-592) also suggests that contributions from some countries are less than complete. Judge Lauterpacht has indicated his awareness of both of these problems in his Preface to the 1951 volume and plans to fill in the gaps as cases become available.

The "Classification" in accordance with which the Editor distributes cases in the volumes has been revised and will fortunately be reprinted each year. It serves a useful purpose and its absence in some previous volumes has been annoying. It is interesting to note that no cases on state responsibility appear in the volumes for 1950, 1951 or 1952.

With the 1953 volume, the Editor is abandoning the practice of assigning marginal case numbers to decisions, and cross references are made to pages. This is an advantage, since there has arisen a tendency—of which the reviewer has himself been guilty—to cite cases by meaningless number rather than by identifying name.

One cannot conclude without paying a tribute to the imagination, skill and patience with which Sir Hersch Lauterpacht has brought to fruition this important series; and one joins with him in expressing gratitude for the exacting labors of his contributors: "Theirs is a selfless task, discharged in the best tradition of service," he writes, "and I can only hope that they will find some compensation in the thought that the *International Law Reports* have, thanks to them, become an indispensable tool for the study, the teaching and the practice of international law."

HERBERT W. BRIGGS

Tratado de Direito Internacional Público. (2d ed.) By Hildebrando Accioly. Rio de Janeiro: Ministry of Foreign Relations, 1956. 1957. Vol. II: pp. viii, 411. Index; Vol. III: pp. viii, 535. Index.

In the review of Vol. I of the Brazilian jurist's *Treatise on International Law*¹ attention was called to the importance of the work not only because of the authority of the Legal Adviser of the Brazilian Foreign Office but because of the light which the treatise throws upon the position of Brazil in a number of controversial issues of recent years.

The present volumes conclude the work, Volume II dealing with international organization and with the scope of territorial, maritime, and aerial jurisdiction; and Volume III with procedures of pacific settlement, and war and neutrality. Of special significance is the treatment of territorial waters and the continental shelf, in respect to which a number of the Latin American states have taken extreme positions. Brazil, as usual, follows a more moderate course, seeking to reconcile conflicting views and to propose a constructive solution. Unfortunately the volume went to press before the Inter-American Council of Jurists met in Mexico City in 1956, where the rôle of Brazil as conciliator of conflicting opinions was put to the test.

The opening chapters of Volume III discuss in detail the forms of pacific settlement and will be useful for the illustrations they give of cases in which Brazil has had a part. Succeeding chapters review the laws of war and neutrality, somewhat academically, it might be argued, in respect to their observance, but justifiably, as the author sees it, in view of the practical possibilities of the existing international situation.

Attention should be called once again to the urgent need of an English translation of the leading treatises of Latin American jurists.

C. G. FENWICK

International Law. Cases, Text-Notes and Other Materials. By Walter H. E. Jaeger and William V. O'Brien. Washington: Georgetown University Press, 1958. pp. xx, 620. \$6.00.

This book, a preliminary edition, is the latest transformation of Professor Freeman Snow's *Cases and Opinions on International Law* (1893).

¹ 50 A.J.L.L. 973 (1956).

Product of the collaboration of Professor Jaeger and a younger colleague, who is Professor of International Law in the Edmund A. Walsh School of Foreign Service, it differs radically from *Cases on International Law* (1937), the well-known product of Professor Jaeger's collaboration with the late Professor James Brown Scott. It is about half the size of the 1937 volume; discards three of the characteristic features of that volume (division of international law into substantive and procedural law, major emphasis of decisions of foreign courts, inclusion of extensive problem notes); omits all cases on compulsive measures, war, and neutrality; and devotes considerable space to a new feature (interspersed text-notes or essays pointing out the significance of the cases reported or discussing questions on which adequate cases have not been found). Some perennial favorites of the classroom will be missed, but their places are acceptably filled by decisions of the last twenty years, including one decision of 1957 and four of 1956. Of the 173 cases reported, approximately one third were decided by international tribunals, one third by American courts and one third by foreign courts. No case appears to have been included in this edition, as some cases may have been in its immediate predecessor, for the sole purpose of impressing the student with the fact that principles of international law are applied, as occasion arises, in national courts throughout the world. The editors have thoughtfully provided a three-page glossary of legal terms. They will doubtless include an index in the definitive edition. The book as it stands is an excellent tool for the teaching of international law, especially to undergraduates. The definitive edition may be expected to be still better.

EDGAR TURLINGTON

Aggression and World Order. A Critique of United Nations Theories of Aggression. By Julius Stone. London: Stevens and Sons; Sydney: Maitland Publications; Berkeley and Los Angeles: University of California Press, 1958. pp. xiv, 226. \$5.00.

Some twenty-five years ago I (hereby adopting the personal pronoun as used in the book under review—though later in the book it becomes "the Writer") made an attempt to define aggression and decided that it was a futile effort. Many others have tried it, some with the same result, some to their own satisfaction. Various League of Nations bodies studied the definition of aggression, and the United Nations has renewed the effort, but not yet has there been agreement on a definition, or even that a definition is desirable.

Dr. Stone covers these efforts with thorough documentation and analysis and arrives at the same conclusion as did this reviewer and many others. At page 3 he is raising doubts as to the practical importance of the notion and as to the possibility of defining it; and at p. 133:

the fact that no adequate and reliable short cuts to the judgment of "aggression" at the moment of crisis are thus available, must inevitably raise the question whether we are wise to continue to try to

base collective peace enforcement action on the notion of "aggression" at all.

There are no objective criteria in the notion of aggression and the desire for them is "a concealed demand for international legislation on a formal basis" (p. 17).

The fact is that no developed legal system has ever succeeded in taking the notion of "aggression" as the central point of its regulation of the use of force. (p. 18.)

The difficulty begins when one tries "to define, in advance of the event and so as to allow automatic application, that quality of State conduct which is to be deemed aggressive" (p. 106). However, neither is "due process" in American Constitutional law capable of precise limitation by advance definition (Chapter VII); but, while there is domestic machinery for mitigating this lack of criteria, "in international society no means exist even of collective redress of the gravest wrongs" (p. 130). With regard to the Draft Code of Offenses against the Peace and Security of Mankind.

sanguine hopes for any dramatic advance in securing international peace by the establishment of individual liability for the crime of "aggression" are without assured base, even if we leave aside the practical question how we could ensure that justice in these matters could in fact be made to apply equally to victor and vanquished. (p. 149.)

So, in Chapter 9, the author reaches certain conclusions. An agreed definition of aggression is unattainable; it is unnecessary for Security Council action (it can act on threat or breach of peace), and unsuccessful in the General Assembly, with its bloc voting and log-rolling, which is not a judicial organ and would only debate interminably whether a situation was aggression or not. The question is rather "Who are the true claimants to international justice? States or human beings?" (p. 168.) All this is difficult but "it behooves us to do what we can," so we should address ourselves "to the central problem of preventing breaches of the peace as such, without trying to beg those questions of ultimate justice, and those questions of preference between competing national versions of justice, which we are as yet quite unable to solve in very many cases." (p. 175.) A "Dis- course" is added at the end, favoring a United Nations Peace Force with limited objectives.

The reader is taken in various directions; he follows several rivulets of thought, sometimes stumbling over an erudite phrase, sometimes pausing to reflect upon an idea; but all the rivulets come together in a steady stream leading out into an ocean of thought yet uncharted. In 1930 this reviewer wrote: "If a State has the right to decide its own rights, and then to defend them, in legitimate self-defense, there can be no control of war"; in 1958 the author writes: "Few will disagree with the view that the problems of third party settlement, of maintaining the peace, and of disarmament, are finally interdependent and must for full success be concurrently approached." (p. 175.) Of what use is it to provide a legal

definition of aggression until the community of nations is so organized that it can apply and maintain law?

CLYDE EAGLETON

La Reconnaissance Internationale et l'Évolution du Droit des Gens. By Jean Charpentier. Paris: Editions A. Pedone, 1956. pp. xii, 357. Index.

There is no gainsaying the fascination which seemingly insoluble problems of international law and relations exercise on students laboring in this field. Recognition in its various aspects and applications is one of those problems. In analyzing recognition, writers have not only attempted valiantly to construct a theory consistent in itself and with heterogeneous facts, but one senses an effort on their part of submitting to governments suggestions for improved practice that would be more consistent and at the same time overcome some of the deficiencies which have been the by-product of the decentralization of the family of nations. Writers apparently feel strongly the need of adhering firmly to some guide lines, whereas governments muddle through with the aid of one or more rules of thumb. Expediency has not been productive of consistency. What makes the situation with respect to recognition somewhat worse is the virtual absence of applicable decisions of international tribunals. Judgments of domestic tribunals more often than not reflect national policies and preoccupations; and out of the welter of municipal reports it is hardly possible to develop a consistent theory.

Dr. Charpentier undertook this study of recognition—of which Professor Suzanne Bastid, in her Preface, says that if it does not present a new theory it presents an original contribution—in spite of the substantial monographs by Professor Lauterpacht and Dr. Chen. Obviously he hoped to avoid the errors of his predecessors and to present a theory which would be applicable to all cases of recognition, including new rules of customary international law. The key concept of his work is “*opposabilité*.” New situations in international relations are either “*opposable*” or “*non-opposable*,” and the effect of recognition depends upon whether it relates to one or the other, although basically recognition has a single meaning in all cases. There is no English equivalent to “*opposable*” and “*opposabilité*” and these terms have been used in their French sense.¹ In some contexts it may mean “*obligatory*” or “*binding*.” Thus in the *Free Zones* case, the Permanent Court of International Justice held that Article 453 of the Treaty of Versailles “*n’est opposable à la Suisse*,” meaning that this article “is not binding” on Switzerland. In another context it may mean “*enforceable*.” Thus in the *Anglo-Norwegian Fisheries* case, the International Court of Justice held that the prolonged abstention of Great Britain would permit Norway “*d’opposer son système au Roy-*

¹ Thus G. Schwarzenberger, *International Law* (2nd ed., 1949), p. 62: “The principle can, therefore, be formulated that short of a customary rule of international customary or treaty law, a new State of affairs is not *opposable* to a State which has not recognized it, and, if it has done so, only within the limits of such recognition.”

opposable," meaning that it would warrant Norway's "enforcement of her system against the United Kingdom." In still other cases it seems to mean no more than that the situation produces legal or juridical consequences.

A change in the international legal order is directly "*opposable*" vis-à-vis third states if brought about in a manner compatible with that order (p. 211). Thus the birth of a new state or a new government, that is, the emergence of new governmental competences or jurisdictions, is directly *opposable contra omnes*. So is the acquisition of new territory by occupation or the drawing of base lines according to a certain system, as in the case of Norwegian waters. International law does not prohibit or regulate the formation of new states through secession or otherwise, nor does it prohibit or regulate the formation of new governments by revolution or otherwise (pp. 160, 167, 168, 174). International law requires merely effective existence of a government and, in the case of new states, territory, population and independence as elements of effective existence. As soon as a new state or government has acquired effective existence it becomes *opposable contra omnes*. Its legislation within the limits of the precepts of private international law becomes applicable, its responsibility is engaged, although in the present state of international judicial organization it cannot be invoked, and its international commitments are valid (p. 169). All these efforts are the result of opposability, and not of recognition.

A situation is "*inopposable*" if it is brought about in violation of, or is incompatible with, the existing international legal order or a particular, presumably, conventional right of another state. An example of the former would be the extension of the sovereignty of a state over portions of the high seas or the continental shelf contrary to the principle of the freedom of the seas (pp. 218, 132). Such situations and others which seem to belong to a different category, like belligerency or the establishment of a protectorate, are "*inopposable*" in the sense that they do not produce a juridical impact on other states. Their only chance of bringing about such an impact appears to be in their effectiveness and, it seems from the author's argument, in their being recognized by other states.

The main error of the prevailing doctrines is their failure to distinguish between opposability and recognition. The author subjects these theories, the constitutive and declaratory, the obligatory and discretionary, and their various combinations, to a searching examination and they are found wanting. What, then, is the right view? According to Dr. Charpentier, recognition in all cases means an engagement on the part of the recognizing state. Recognition, he says, "being a voluntary act, takes place within the scope of obligations of the State which grants it. Recognition is an engagement. Thus appears the unity of the act of recognition: recognition always being an engagement, its immediate effect is to obligate the State granting it to respect the situation which is recognized." (p. 202.) The fundamental unity of recognition is compatible with a diversity in application. In connection with situations which are *opposable*, recognition has minor significance, presumably because it does not

increase substantially the obligations of the recognizing state. On the other hand, in connection with situations which are *inopposable*, recognition has the effect of adding materially to the recognizing state's obligations.

Recognition thus conceived is always relative in the sense that it has binding effect on the recognizing state alone (p. 265). It is also invariably unilateral, discretionary and revocable (pp. 270, 275, 281). In case of an *opposable* situation such as a new state or government, the withdrawal of recognition does not affect the opposability but terminates the effects proper to recognition (p. 276). On the other hand, in case of an *inopposable* situation such as the illegal conquest of Ethiopia by Italy, revocation has the effect of restoring the original inopposability. Such was the effect of the British withdrawal in 1940 of the recognition accorded this conquest in 1938 (p. 277).

Turning to the consequences of recognition, the author points out that these relations normally include exchange of diplomatic representatives, the right to sue and the right to dispose of assets in the territory of the recognizing state (p. 207). He attaches great importance to the point that recognition does not obligate the state to any particular relationship, and that the relations which normally follow recognition are not in any sense necessary consequences of it: recognition is the *condition* of diplomatic relations, the right to sue and the right to dispose of assets (pp. 209, 212, 213).

At this point the author's view of recognition becomes difficult to distinguish from the declaratory doctrine. If recognition is "proof of the validity of the situation with respect to the State which granted it," in what, precisely, does the distinction lie? If, on the other hand, a situation is opposable *erga omnes*, that is, has legal effect regardless of recognition, is this not precisely the assumption underlying the declaratory doctrine? And if such a situation has legal effects without recognition, why is recognition given the meaning of "proof" or "attestation"? By attributing to recognition the meaning of "proof" or "attestation," the author slides back into the realm of the constitutive doctrine and abandons his view concerning "opposability," although some incidents of state practice cannot be explained in any other way. An unrecognized state or government is as responsible for observing international law as is a recognized state or government. This is surely the sense of the *Tinoco* and the *Corfu Channel* cases. To be sure, in the absence of relations, there is no practical method available to states to insist upon the consequences of responsibility. However, mere "attestation" of the existence of a new state or government would not change the situation unless it were followed by the initiation of relations. By conceiving of recognition as "proof" or "attestation," the author confers upon governments a power or competence which they do not possess under positive international law. It may be attractive but it is somewhat misleading to regard states as organs of international law and to attribute to them the power to grant or to refuse "attestation" to new states or governments.

The situation might be different if the process of recognition were col-

collectivized, although it is quite conceivable that collectivization would merely intensify defects. The author devotes some attention to the effect of international organizations, particularly of the United Nations, upon recognition. His analysis leads him to point out that this effect is less than what might have been expected.

This is a useful and, apart from some minor blemishes, a carefully documented study and Dr. Charpentier has shown remarkable courage and determination in undertaking it.

LEC GROSS

Nationality and Statelessness in International Law. By P. Weis. London: Stevens and Sons, 1956. pp. xxviii, 338. Index. \$10.10.

Although nationality laws are among the most intimate and jealously guarded parts of municipal law, the state's powers in nationality matters are not entirely unlimited. However fragmentary the principles of international law on nationality may be, nationality laws must conform to them. As long as nationality laws operate strictly within the state, international law does not come into play. Only in situations in which nationality laws have some trans-national effects, do conflicts with international law arise. Such an international aspect presents itself, for example, when the question is one of determining a disputed nationality in cases of claims for diplomatic protection or in settling jurisdictional disputes before claims commissions.

In his book Dr. Weis offers a systematic discussion of nationality laws in relation to international law. The third part of his study, "The Public International Law of Nationality," deserves particular attention. It discusses the limitations on conferment and withdrawal of nationality; the effects of territorial transfers on nationality; statelessness and plural nationality. Of special interest is the author's discussion of proof of nationality before international tribunals and municipal courts—a problem frequently omitted. Throughout his presentation the author maintains a happy balance between jurisprudential and doctrinal discussions.

This thorough and lively study reveals the existence of few well-established rules of international law. Thus, for example, voluntary naturalization of an individual is firmly established as is the principle according to which naturalization is considered *prima facie* valid unless proved that it has been obtained by fraud, misrepresentation or concealment of material facts. International law neither recognizes a right to nationality nor prohibits statelessness. As individuals may claim some international protection only through their states, numerous stateless persons are without any international protection. To alleviate and reduce its undesirable consequences, Conventions relating to the Status of Refugees and on Status of Stateless Persons were concluded.

Unfortunately the judgment of the International Court of Justice in the *Nottebohm* case was rendered too late to be fully discussed by the author. The case was decided by the International Court of Justice on grounds of effective nationality. In arriving at the decision, the Court may have been

unduly impressed by the fact that this "nationality of convenience" was obtained during the war to secure neutral status. In this connection the reviewer wishes to make one of the few reservations to the otherwise excellent study. As the *Nottebohm* case well shows, the interpretation of nationality laws both by international tribunals and municipal courts may well depend on the conditions in which naturalization or loss of nationality occurs. The author's very brief reference to enemy status would have warranted fuller investigation. Nationality laws of most Eastern European countries require permission for expatriation, short of which, the nationality of the refugee continues. In these circumstances, it is unfortunate if the courts of a third state regard the individual as retaining the nationality of the state with which he has severed all ties. The Swiss Supreme Court reached such a decision not so long ago (*Stransky v. Zivnostenska Banka and Obergericht of Canton Zurich*, 81 *Bundesgerichtsentscheide* I at 232 (1955)). For this reason the term "stateless person" must also include a *de facto* stateless person, a concept which seems to rest on the negative aspect of effective nationality and which is mentioned by the author only briefly. Finally, reference may be made to a judgment of the United Nations Administrative Tribunal (*Julhiard*, Judgment No. 62, Dec. 3, 1955) which decided the question of plurality of nationality of an international civil servant.

Realistically appraising the possible development of principles of international law in the field of nationality, the author correctly views this prospect as being an integral part of larger "... efforts for the integration of human rights in international law and for their guarantee by the safeguards of international law." (p. 260.)

Since he was associated with the International Refugee Organization and the United Nations High Commissioner for Refugees, Dr. Weis brings to his study practical experience and profound insight. His study is an excellent and notable contribution to a much neglected field.

GERHARD BEBE

The British Year Book of International Law, 1955-56. C. H. M. Waldock (editor). London, New York, Toronto: Oxford University Press, 1957. pp. viii, 367. Index. \$8.80; 55 s.

The 32nd issue of the *British Year Book of International Law* is by title designated as covering 1955 and 1956, possibly to reduce the gap between the year of publication and the year covered by the contents. With this volume, Professor C. H. M. Waldock assumes editorial direction of the *British Year Book* and it is clear that the work is in able hands.

Professor Waldock himself contributes a perceptive analysis of the "Decline of the Optional Clause," but appears to the reviewer to be overly concerned with what he refers to as "a glaring inequality in the position of a State which does and a State which does not make a declaration" accepting the compulsory jurisdiction of the International Court of Justice. Just why a state which has for years declared its willingness to be sued

on the basis of conditions formulated by itself should feel unfairly treated unless it can denounce its declaration of acceptance when sued by a more recent convert, is not clear to this reviewer. Professor Waldock is properly critical of the "pernicious" reservation by the United States of domestic jurisdiction "as determined by the United States."

Sir Gerald Fitzmaurice continues his now indispensable series on "The Law and Procedure of the International Court of Justice" on points of substantive law decided from 1951 to 1954. In relation to the *Minquiers Case* he breaks new ground in his discussion of the so-called "critical date" after which the actions of parties to a dispute can no longer affect the issue. With illuminating perspective, Sir Hersch Lauterpacht discusses "Briefly", Contribution to International Law." Dr. R. B. Loober of the University of Illinois has two studies in the volume: a useful note on "The Treaty Power in India" and a comprehensive and critical article on "'Federal State' Causes in Multilateral Instruments." Other articles are contributed by Mr. D. H. N. Johnson on "The Effect of Resolutions of the General Assembly of the United Nations"; by Dr. G. C. Cheshire on "The Significance of *The Assunzione*" in crystallizing "the doctrine of the proper law of the contract"; by Dr. D. W. Bowett on "Collective Self-Defence under the Charter of the United Nations"; by Professor Norman Bentwich on "International Aspects of Restitution and Compensation for Victims of the Nazis"; and by Mr. E. Lauterpacht on "The Hague Regulations and the Seizure of *Munitions de Guerre*." There are notes by Mr. A. G. Lyons and Professor Luke T. Lee, book reviews, and decisions of English courts during 1955 involving questions of international law.

The volume is almost 200 pages smaller than the 1954 *British Year Book*, but the contents are richly rewarding.

HERBERT W. BRIGGS

Annuaire Français de Droit International. Vol. II, 1956. Paris: Centre National de la Recherche Scientifique, 1957. pp. xx, 990. Index. Fr. 2400.

The 1956 *Annuaire Français de Droit International* fully justifies the expectations of scholars who found the 1955 volume so useful. Already the *Annuaire Français* occupies a unique position in the literature of international law and there should be no question of the necessity for continuing it.

The current volume contains twenty-one articles covering 376 pages. Georges Scelle and Roger Pinto contribute articles on the Suez Canal crisis, written before the *dénouement* of its military aspect. Paul Reuter discusses the right of secrecy in relation to international institutions. Michel Virally writes on the legal effect of "recommendations" of international organizations. André Gervais draws lessons from a comparative study of the various Palestinian, Korean and Indochinese armistices. There are articles on aspects of French relations with Morocco, Vietnam, Togoland, the Saar, Libya, and French Guiana, as well as studies of the "franc" monetary zone and the regular French commercial air services. Of

more general interest are articles on meteorological balloons, experimentation in nuclear weapons, the continental shelf, the Geneva Conventions, the Red Cross and the "Five Principles" of co-existence.

As in the 1955 *Annuaire*, the rest of the volume contains a rich mine of materials on international law and the legal aspects of international organization. About 140 pages are devoted to *notes doctrinales* on opinions of the International Court of Justice, the *Ambatielos* and other international arbitrations, commissions of conciliation, the Court of Justice of the Coal and Steel Community and the Administrative Tribunal of the United Nations. About 160 pages are devoted to studies of legal problems connected with the United Nations and its specialized agencies. The work of the United Nations International Law Commission receives more adequate attention than it was given in the 1955 *Annuaire*, and Jacques Dehaussy makes a useful and critical analysis of the Commission's draft on the Law of the Sea. French judicial decisions relative to international law during 1955 and official French practice as revealed in diplomatic correspondence, *communiqués*, interpellations and other official statements relating to international law occupy another 140 pages of text and commentary. The Chronology of "international facts" relating to juridical matters, book reviews, and the magnificent bibliography of works and articles published in the French language complete the volume of almost 1000 pages. If retrenchment—a financial fact not unknown to journals of international law—is ever necessary for the *Annuaire Français*, it might wisely be used to eliminate the Chronology and perhaps to reduce the number of *Études*.

There is much in the *Annuaire Français* to read with immediate interest. There is even more to consult as need arises on future occasions. Materials of permanent value have been made available. The Editorial Committee of Mme. Suzanne Basdevant Bastid, MM. Georges Fischer and Daniel Henri Vignes is to be congratulated once again for the distinguished contribution made by the *Annuaire Français* to the study of international law.

HERBERT W. BRIGGS

Annuaire de l'Institut de Droit International. Vol. 46. *Session de Grenade, Avril 1956*. Basel: Verlag für Recht und Gesellschaft, 1957. pp. lxxviii, 507. Fr. 65.

The 46th volume of the *Institut de Droit International* contains the Statutes and Regulations of the *Institut*, its Bureau, membership list, list of Commissions, table of contents of the resolutions adopted in its forty-seven sessions held between 1873 and 1956, biographies and bibliographies of newly elected associates and necrologies of deceased members.

The principal content deals with its forty-seventh session, held from April 11 to 20, 1956, in the beautiful city of Granada. Three problems could not be discussed, one because of the illness of the *rapporteur*, the other two because of lack of time. All thirteen plenary meetings were dedicated to four problems. In the field of conflict of laws the prob-

occupation of Germany, Dr. O'Brien admits that the significant cases of the nineteenth century sanction a relatively uninhibited rule of the military in American occupations and that contemporary writers such as Corwin, Rossiter and Fairman have drawn upon these cases for what may be briefly described as the view that American military government is limited legally only by international law. Nevertheless it is questionable, says Dr. O'Brien, whether the standard nineteenth-century cases are really applicable to the unique occupation of Germany. He gives attention to the so-called Insular cases, of which *Downes v. Bidwell* (182 U. S. 244, 1900) is regarded as significant. In that case the majority of the Court denied the applicability of certain Constitutional guarantees to Puerto Rico, yet indicated a belief that there were some "fundamental natural" rights which should be extended to unincorporated "foreign" territories of the United States. Of greater significance to Dr. O'Brien is *Ochoa v. Hernandez* (230 U. S. 139, 1912), which arose in Puerto Rico subsequent to hostilities of the Spanish-American War. There the Court held, *inter alia*, that a military order depriving two Puerto Rican boys of their lawful inheritance by reducing the period necessary for acquisition of land by prescription "was null and void because in contravention of the 'due process of law' clause of the Fifth Amendment to the Constitution of the United States." Therefore the author concludes that, at least as to the undefined "fundamental natural" rights, the Constitution does follow the American flag to newly conquered territories populated by alien peoples.

In his consideration of more recent cases such as *In re Yamashita* (327 U. S. 1, 1945) and *Johnson v. Eisentrager* (339 U. S. 763, 1949) the author follows the views of the dissenting justices, although he admits that, for the present at least, the Court will maintain the *status quo*. Thus the stage is set for a suggested American *jus gentium* of the type developed by the Romans for application to aliens under Roman rule.

In a scholarly and extensive treatise on "The Meaning of 'Military Necessity' in International Law" by Dr. O'Brien, necessity is separated into two sometimes overlapping parts, state necessity (*raison d'état*) and military necessity (*raison de guerre*), although he quite candidly admits that, excluding self-defense and reprisal, there is a dearth of historic instances of state necessity. As is customary in international law, the author distinguishes two rival theories of military necessity, namely, the so-called unlimited theory which is better known as "*Kriegsraison*" because it was advanced by German writers, and the limited theory of Francis Lieber, stated as follows:

Military necessity, as understood by modern civilized nations consists in the necessity of those measures which are indispensable for securing the ends of war, and which are lawful according to the modern law and usages of war.

Even though the author admits that the conduct of World War II seemed to resemble more closely a display of *Kriegsraison* in action than that conceived by Lieber and adopted by the Hague Conferences, nevertheless he finds support for the limited theory in the War Crimes Trials and

in recent publications. Surely one may not disagree with the author's plea for greater recognition of natural law as a limitation on military necessity and "a return to belief in and respect for the higher necessities of the international community, of mankind and of God."

In 1946 two officers of the office of The Judge Advocate General of the Army submitted a memorandum to the Institute entitled "Present Applicability of the Hague and Geneva Conventions in Germany." The interesting comments of some members of the Institute were returned to The Judge Advocate General in 1947 for utilization, although Dr. Feilchenfeld had withheld his own comment while searching for an "optimum theory." The officers' memorandum said in substance that (a) the authority of the Allied Control Council and the United States Zone Commander was not limited by the pertinent Hague Regulations, although the general rules expressed in these Regulations were to be considered as guiding principles until occupation policies required deviation; (b) the authority of the representatives of the occupying Powers was limited by agreements between such Powers and by such rules of international law as condemn crimes against peace and humanity; and (c) the provisions of the Geneva Convention of 1927 (*sic*) would apply only to those who acquired prisoner-of-war status prior to the general surrender or were accorded such status at a later date.

The comments of members of the Institute were fairly uniform in accepting generally, upon varied theories, the foregoing conclusions, except as to the status accorded enemy nationals captured after May 8, 1945. Many members disagreed with this latter course of action, doubting that General Eisenhower, by a change in name to disarmed enemy personnel, could change the status of these members of the military forces so as to deprive them of the protection accorded by the Geneva Convention.

In 1949 Dr. Feilchenfeld succinctly expressed his views on the "Status of Germany" which are published in the present volume: "Germany is a novel and thus far unique form of statehood, subject to allied rule *sui generis*." After complete justification of this view, he concluded that statesmen should determine the fate of nations, and that

These statesmen should have more and better legal advice, but legal theory is no substitute for wise statesmanship. Nothing else is.

A distinguished German, writing in 1955 under the pseudonym of Dr. Friedrich Fritz, continues the discussion, headed "Once Again: Germany's Legal Status," with emphasis on the separation of portions of the former German Reich into the Federal Republic, the German Democratic Republic, the split territory of Berlin, the Saar territory and the territories east of the Oder and Neisse under Polish administration or assigned to the Soviet Union. Does this *de facto* partition indicate dismemberment? What is the legal relationship between the former Reich, the Federal Republic and a future reunited all-German state? Which theory ought to be applied, succession or identity? Dr. Fritz fails to find "legally satisfactory answers" to these questions because of constant changes in this political sphere.

It seems to the writer of this review that there is a distinct place in our literature for a yearbook of the character illustrated by this first volume. The publication may spur the eminent and learned members of the Institute to greater participation, which would enhance the value of future yearbooks.

CLAUDE B. MICKELWAIT

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The Year Book of World Affairs, 1956. Edited by George W. Keeton and Georg Schwarzenberger. London: Stevens & Sons Ltd., 1956. pp. xii, 420. Index. £ 2/2 s.

The tenth volume of this *Year Book* of the London Institute of World Affairs comprises twelve articles, a comprehensive and systematic bibliography and a consolidated index to Volumes 1-10. The articles cover a wide range of subjects in the broad field of international relations. Taking them in the order in which they appear, Lord Lindsay (The Geneva Meetings) discusses some conditions of co-existence, calls for frank discussion of the crucial issues and suggests procedures. To secure peaceful co-existence, he argues, the leaders on both sides must not only be convinced that they prefer peace,

they must also be convinced of one of two things; either that their beliefs about the social structure on the other side of the Iron Curtain are mistaken, or else that the leaders on the other side are both willing and able to make the changes in the social structure which would be necessary for the acceptance of peaceful coexistence. (p. 5.)

Susan Strange (Strains on NATO) analyzes the weaknesses of this collective defense group under three heads: lack of co-ordination of British, French and American policy; high proportion of colonial Powers; and the growing identification, especially in Afro-Asian eyes, of NATO "as a kind of Rich Man's Club." Such weaknesses cannot be offset by structural changes or additions. Professor Frank Tannenbaum (The Continuing Ferment in Latin America) emphasizes the uniqueness of the conditions of the Latin American Republics which accounts for the continuing cycle of revolution in a large majority of them. The virtually complete absence of genuine party organizations precludes the development of modern states. The army, he claims, has replaced the old ruling groups and a change in government can only result from a division in the ranks of the army which is the new "governing family." F. Parkinson (Bandung and the Underdeveloped Countries) describes some aspects of the struggle of the Afro-Asian countries "for higher status in the hierarchy of international society" (p. 66). This struggle is carried on partly and rather successfully on the parliamentary plane inside the United Nations and on the extra-parliamentary plane. The Bandung Conference was the first major, but probably not the last, manifestation of the latter. J. Frankel (The Middle East in Turmoil) surveys the politics of this area which to a Western observer

appear anachronistic through their persistent irrational appeals to rationalistic passions and through the leaders' reluctance to face, and the inability to solve, the problems of outdated and crumbling economic and political structures. (p. 97.)

In spite of Soviet penetration, he believes that "the unleashed forces of nationalism can be utilized for the purposes of power politics, but cannot be fully controlled." The peoples of the "Muslim intercontinent," far from being passive pawns "in the game of power politics . . . are now using international rivalries in order to assert themselves." He concludes by saying, perhaps over-optimistically, that "for better or for worse the Middle East seems to be firmly launched in the direction of complete independence" (p. 109).

"Security in the Pacific" is the title of J. G. Starke's study of the ANZUS Pact in comparison with NATO and SEATO. The feature which distinguishes the former from the latter is that it manifests the disposition of the United States to extend the Monroe Doctrine to the territories of the contracting states in the Pacific. Australia and New Zealand attach great significance to the Pact because it confers upon them "a unique privilege of access" to the United States which would be lost if the Pact were to be merged with a general Security Organization for the Pacific. Professor C. H. Alexandrowicz (India's Himalayan Dependencies) contributes a valuable essay on the treaty relations between India on the one hand and Tibet, Sikkim, Bhutan, Nepal and Kashmir on the other. Contrary to the widespread opinion that Communist China committed aggression in Tibet, he believes that Peking merely reasserted the traditional suzerainty of China over Tibet. In "Commonwealth Conferences 1945-1955" J. D. B. Miller discusses the difference between meetings of the Imperial Conference and the contemporary form of co-operation between members of the Commonwealth. Charnain Edwards Toussaint's is a useful survey of "The Colonial Controversy in the United Nations," and I. Paenson and G. L. Goodwin contribute interesting essays on "The Problem of East-West Trade" and "GATT and the Organization for Trade Co-operation," respectively. Professor W. Friedmann traces the limits of "Functionalism in International Organization" largely on the basis of the experience of the European Coal and Steel Community. One does not have to agree with his contention, that "perhaps the last ten years have made the reconsideration of the assumption that the maximum amount of world government is desirable, however difficult it may be to attain, more questionable than before" (p. 259), in order to appreciate the thoughtfulness of his analysis or its important practical application. The European Coal and Steel Community, having achieved one of its primary purposes, the establishment of a common market, is facing the problem of how to proceed with its limited powers further on the road toward integration. It would appear from Professor Friedmann's study that fractional integration may not only be undesirable but in the long run also self-defeating.

One cannot but congratulate the editors on the general excellence of the papers collected in this volume, although some of them, because of their

topical character, might have been more effective if published closer in time to the events with which they are concerned.

LEO GROSS

Political Handbook of the World, 1957. Edited by Walter H. Mallory. New York: Harper and Brothers for Council on Foreign Relations, 1957. pp. viii, 227. Index. \$3.95.

This, the latest edition of the annual *Political Handbook*, provides factual information with respect to 87 governments, their parliaments, parties and press as of January 1, 1957. There is also a brief description of the United Nations, including the International Court of Justice. Of the 87 governments or states, 61 are treated in some detail, whereas only the most fragmentary sort of information is provided with respect to 22 countries. No explanation is offered by the editor for this arrangement, which is clearly unsatisfactory. It may well be that information concerning these countries is difficult to obtain. However, if it is difficult for the Council on Foreign Relations, which disposes of substantial resources and facilities, to obtain the relevant data, it is even more so for the individual user of the *Handbook*. Among the countries which receive barely a mention are many which figure prominently in current international affairs, such as Afghanistan, Jordan, Korea, Lebanon, Morocco, Syria, Tunisia, Vietnam and Yemen. As the editor welcomes criticisms and suggestions, the reviewer ventures to suggest that this gap be filled to the greatest extent possible.

It would be useful to organize the information in accordance with some recognizable pattern or scheme. With respect to some countries the form of state is given, such as "republic," in other cases this is omitted. In some cases the form of government is indicated, in others it is omitted. The existence of a constitution is mentioned occasionally, but one would not be warranted in drawing the inference that there is no constitution in a country where the information supplied is silent on this point. Every country has a constitution, written or unwritten, formal or customary, and it is organized and functions in accordance with some fundamental law.

Apart from some blemishes of this kind, the present volume of the *Handbook* continues a splendid tradition, and it needs hardly to be emphasized again that it is an indispensable tool for all professional and amateur students of international affairs.

LEO GROSS

International Government. (3rd ed.) By Clyde Eagleton. New York: Ronald Press Co., 1957. pp. xxii, 665. Index. \$6.50.

Little more need be said of the 3rd edition of Professor Eagleton's volume than that it is the work of one who had himself contributed significantly for more than a generation to the international government which he describes. His services to a better understanding of the League of Nations were recorded in the first edition of the volume in 1932. The second edition, published in 1948, marked the transition to the United

Nations in the first stages of its development, recording, although without specific reference, the experience of the author in the preparation of the Dumbarton Oaks Proposals. Now a new and enlarged edition brings us an analysis and critique of international government at the close of a decade that has been marked by the testing of the United Nations as an agency of peace and by the steady and highly encouraging growth of the activities of the agencies of the United Nations in the fields of economic development and social welfare.

The opening chapters on the evolution of the international community towards world government offer what might well form a preliminary course in international law, leading into the broader field of international relations. The main body of the volume then concentrates upon international government as expressed in the United Nations and its specialized agencies; and it closes with a detailed analysis of the problem of war, in which the author has long since established himself as a counselor of judgment and discretion. No better volume can be found for college or university courses on the subject.

C. G. FENWICK

The World Health Organization: A Study in Decentralized International Administration. By Robert Berkov. Geneva: Librairie E. Droz, 1957. pp. x, 176. Bibliography. Sw. Fr. 16.

The peculiar difficulties inherent in international administration as observed in international agencies antedate the twentieth century, but the search for useful solutions to these problems has been most noticeable in the period since World War I. In early studies the technical problems of administration, although not entirely ignored, were often relegated to a secondary position in favor of emphasis on the paramount political power balances involved. Robert Berkov in the present study has sought to redress the unequal nature of earlier treatment by orienting his study of the World Health Organization around an analysis of its administrative procedures. More specifically he has emphasized the Organization's unique system of decentralization to the regional office level of function and administration, including the very important element of policy formation.

In discussing the results of the decentralization experience Mr. Berkov arrives at no positive or terminal conclusions and for this restraint appreciation is in order. The WHO is obviously still in the formative stages and a definitive review at present is proscribed by that circumstance alone. In proceeding to develop an objective definition the writer displays an almost excessive neutralism. There is little in this study to disturb the most sensitive WHO administrator nor is there any but the most moderate and restrained suggestion of criticism for the sometimes undeniably chauvinistic attitude of some Powers toward the Organization and its regional activities. The writer's style is succinct, terse—the end effect is almost one of arid non-partisanship as he seeks to achieve non-involvement. Apart from that one small reservation, the study is a valuable and concise survey of the special administrative problems of the WHO. Essentially

this is a progress report on the efforts of an international specialized agency to implement a program for a needed public service (in this case, public health) and, at the same time, secure the greatest co-operation from the participating national entities.

JOHN S. GILLESPIE

Foreign Relations of the United States. Diplomatic Papers, 1937: Vol. I: General. pp. viii, 1015. \$4.25; Vol. II: *The British Commonwealth, Europe, Near East and Africa.* pp. vii, 971. \$4.25; Vol. III: *The Far East.* pp. iii, 1008. \$4.25; Vol. IV: *The Far East.* pp. iv, 911. \$4.00; Vol. V: *The American Republics.* pp. v, 807. \$3.75. Washington: Government Printing Office, 1954. 1938: Vol. I: *General.* pp. viii, 1009. \$4.25; Vol. II: *The British Commonwealth, Europe, Near East and Africa.* pp. vii, 1136. \$4.00; Vol. III: *The Far East.* pp. iii, 768. \$3.50; Vol. IV: *The Far East.* pp. iii, 638. \$3.25; Vol. V: *The American Republics.* pp. v, 995. \$4.95. Washington: Government Printing Office, 1954 (Vol. III), 1955 (Vols. I, II, IV), 1956 (Vol. V). 1939: Vol. I: *General.* pp. viii, 1059. \$4.50; Vol. II: *General; The British Commonwealth and Europe.* pp. vii, 911. \$4.00; Vol. III: *The Far East.* pp. iii, 883. \$4.00; Vol. IV: *The Far East, Near East, and Africa.* pp. v, 905. \$3.50. Washington: Government Printing Office, 1955 (Vols. III, IV), 1956 (Vols. I, II). Indexes.

These volumes of *Foreign Relations* present a vast amount of information for the general reader as well as the specialist in international law. The quantity of the material does not permit a general treatment of the events of these momentous years such as the Spanish Civil War, the undeclared war between Japan and China, the Austrian *Anschluss*, the fall of Czechoslovakia and the outbreak of World War II. The limitations of review necessitate considerable selectivity. Attention will therefore be restricted here to what these volumes provide on the British Commonwealth of Nations. Even within this limitation there can be but illustrative mentions.

Existing doubts as to the independent status of the Commonwealth nations were rapidly being dispelled in the years 1937 through 1939, but the completeness of the process was still being questioned. In connection with the Johnson Act the Secretary of State referred to the 1934 opinion of the United States Attorney General, which held that Canada, as a member of the Commonwealth, was not to be regarded as a political subdivision of Great Britain (1937, Vol. I, pp. 858-859). The United States Secretary of State despaired at arriving at an accord with the New Zealand Government over discrimination against American commerce in Samoa and instructed the American Chargé in the United Kingdom to take the matter up with Mr. Anthony Eden. The Foreign Office politely replied that this was a matter between the United States Government and "His Majesty's Government in New Zealand." (1937, Vol. II, pp. 210, 215.) Sir Robert Vansittart, in discussing the forthcoming Imperial Conference, was reported as saying that

it was more and more realized that it would be a discussion between various independent commonwealths, with perhaps the probable greater advantage accruing to the Dominions rather than to England. (1937, Vol. I, pp. 74-76.)

The United Kingdom also consulted with Commonwealth countries in the formulation of international policy as, for example, in the case of the Czech crisis (1938, Vol. I, p. 577). Ireland's independent status was reflected by the fact that she remained neutral after the outbreak of World War II and protested to the United States because the latter considered her to be in the combat zone (1939, Vol. I, p. 704).

The United States Government maintained its traditionally close ties with the Canadian Government. Negotiations were proceeding, albeit slowly, on the St. Lawrence Waterway and the Alaskan Highway (1937, Vol. II, pp. 168-176, 192-198; 1938, Vol. II, p. 177; 1939, Vol. II, p. 333). The United States still had little direct involvement in the affairs of the other Commonwealth countries. In 1937 the American Ambassador in the United Kingdom informed the Australian Prime Minister that in his opinion it

would be impossible to secure any form of agreement which would bind our Government in any way whatever looking towards the protection of Australia from an attack by Japan. (1937, Vol. II, p. 141.)

The Commonwealth countries were disturbed by American neutrality legislation (1939, Vol. I, pp. 671, 679), which Neville Chamberlain called "an indirect, but potent encouragement to aggression." (1937, Vol. I, p. 100.) Great Britain was rearming at a rapid pace in 1937 (*ibid.*, p. 127). The Imperial Conference of 1937 stated that the first objective of the Commonwealth was peace, and that it would not use its members' armaments for aggression or for any purposes contrary to the Pact of Paris or the Covenant of the League. At the Conference Australia favored regional understanding and a pact of non-aggression by the countries of the Pacific (*ibid.*, p. 747.)

The United Kingdom and the United States co-operated closely in the Sino-Japanese problem; however, the documents offer little that is startling on these events. (See 1937, Vols. III, IV *passim*; 1938, Vols. III, IV, *passim*; 1939, Vols. III, IV, *passim*.) Great Britain, the Commonwealth countries and the United States continued to consult on the resettlement of European refugees (1938, Vol. I, pp. 104-105, 740, 882). The United States was quite cool toward the Anglo-Italian Agreement of April 11, 1938 (*ibid.*, p. 133). President Roosevelt obviously did not approve of United Kingdom policy in regard to the Jewish question in Palestine (1939, Vol. IV, pp. 757-758).

International economic relations, although not encouraging, showed some improvement over previous years. The United States was attempting to reduce trade barriers by concluding reciprocal trade agreements with the Commonwealth countries. It was made clear that the British could only obtain concessions of value "at the expense of less

exclusiveness in the British Empire." (1937, Vol. II, pp. 3-4.) In order to grant concessions to the United States, Great Britain was forced to request that the Commonwealth countries permit relaxations of imperial preferences. The United States suggested that Great Britain could negotiate with the Dominions in Washington. Sir William Brown expressed "horror" at the idea of an "Ottawa Conference in Washington" and feared the Dominions would logroll the United Kingdom into an untenable position which would cause a breakdown in the negotiations (*ibid.*, pp. 73-74). The difficulty between the United States and Australia over the latter's discrimination against American goods ended in 1938 and Australia was again granted most-favored-nation tariff treatment by the United States (1938, Vol. II, pp. 125, 131). Secretary Hull informed the British Ambassador that Empire preference was the "chief complication" in trade negotiations and called it a "seclusionist policy" which would reduce the total volume of world trade (*ibid.*, p. 67). Reciprocal Trade Agreements were concluded with the United Kingdom and Canada on November 17, 1938 (*ibid.*, pp. 1, 164). During 1939 the United States carried on discussions with Australia over a trade agreement (1939, Vol. II, p. 325), and negotiated a Treaty of Commerce and Navigation with India (*ibid.*, p. 349).

There are numerous other questions which have special interest for the international lawyer. Some of them may be summarized briefly as follows:

In 1937. Conflicting American and British claims were advanced on various islands in the Pacific and Roosevelt noted that "... discovery does not constitute national possession . . . unless discovery is followed within a reasonable period of time by permanent occupation." (Vol. II, pp. 125-127.) The United Kingdom drew the Japanese Government's attention to the rules of international law in regard to the sinking of merchant vessels and reminded Japan that the latter had signed the submarine protocol the previous year (Vol. IV, p. 459). Guatemala requested the President of the United States to arbitrate a border dispute with the United Kingdom over Belize, but the United Kingdom wished to refer the matter to the Hague Court (Vol. V, pp. 120, 131). Honduras attempted to extend her domain beyond the traditional three-mile limit by searching a British vessel on the high seas. Britain and the United States protested Honduras' action (*ibid.*, pp. 595, 597). The United States seized a British vessel on the high seas. His Majesty's Government protested

that no amount of illegality by a British vessel, other than a pirate, would justify her arrest by the United States authorities on the high seas outside of treaty limits.

Secretary Hull expressed regrets (Vol. II, pp. 107, 121, 124).

In 1938. Correspondence over conflicting Anglo-American claims to the title to numerous Pacific Islands continued. Roosevelt threatened to place all islands not occupied in the area between Samoa and Hawaii

under the jurisdiction of the Secretary of the Interior, if action were not taken (Vol. II, pp. 77-119). The Anglo-Guatemalan boundary dispute over Belize continued with no significant developments (Vol. V, p. 292). With respect to Britain's intent to grant *de jure* recognition to the emperor of Ethiopia, President Roosevelt informed the Prime Minister of Great Britain that this would have a harmful effect on the "course of Japan in the Far East." The President felt that

At a moment when respect for treaty obligations would seem to be of such vital importance in international relations . . . surrender by His Majesty's Government of the principle of non-recognition . . . would have a serious effect on public opinion in this country. (Vol. I, p. 121; see also pp. 133-134.)

The United Kingdom protested against the bombing of open towns and non-military objectives in Spain and requested the United States to make a similar statement (*ibid.*, pp. 154-155). By refusing to grant belligerent rights to either party in the Spanish Civil War, Great Britain prevented an effective naval blockade of Spain and, in the opinion of the American Chargé at London, indirectly encouraged the bombing of ships in Spanish ports as a substitute for blockade (*ibid.*, pp. 222-223). Great Britain protested the indiscriminate bombing of Canton (Vol. II, p. 614). Britain and the United States discussed Japanese violation of the Nine Power Treaty and possible means of settling the Far Eastern question (*ibid.*, pp. 89-93).

In 1939, The United States reserved "all rights" on claims to territorial sovereignty implicit in an exchange of notes on aerial navigation in the Antarctic between France, Great Britain, Australia and New Zealand (Vol. II, p. 1). The United States protested against restrictive trade measures on American goods in violation of her treaty rights in Kenya (*ibid.*, p. 323) and Palestine (Vol. IV, p. 811). An Anglo-American agreement on the joint administration of the Enderbury and Canton Islands was concluded, but a general agreement was not attained on sovereignty over the disputed islands in the South Pacific (Vol. II, p. 306 ff.).

France and the United Kingdom made a declaration setting forth the international conventions by which they would abide if war were "forced upon them." (Vol. I, pp. 547-548.) Australia, India, New Zealand and the United Kingdom suspended the operation of the London Naval Treaty of March 25, 1936 (*ibid.*, p. 559). Soon after the outbreak of war, France and Great Britain resorted to reprisals against Germany's "acts of violence, condemned by international and humanitarian laws" and seized all German exports (*ibid.*, pp. 781-783, 786, 788). The *Athenia* was sunk by a German submarine in violation, the British charged, of international law, and the British Admiralty recollected in a *communiqué* that Germany had agreed to abide by the London Naval Treaty of 1930 in "perpetuity" (Vol. I, pp. 283, 300.) The United States protested against Great Britain's censorship of American mail in violation of Hague Convention XI of 1907 (*ibid.*, pp. 266, 270). The United States refused to sell surplus merchant ships of the Maritime Commission to Great Britain, for

"a government may not sell such ships to a belligerent government without violating neutrality." (*Ibid.*, p. 304.)

By 1939 a new pattern was emerging in the Commonwealth which was to have far-reaching effects on American and international affairs. Nelson T. Johnson, the American Ambassador in China, perceived this with remarkable clarity. He noted:

History will record that the outstanding event of this decade was the end of the British Empire as a unit. The Statute of Westminster marked that end. London is paralyzed now in any decision . . . for it cannot make such a decision on the assumption that Canada and Australia and South Africa will support its decision . . . we must from now on share with Canada, Australia, South Africa and England the responsibility of maintaining the ideals which characterized international intercourse during the years that the British Empire was dominant in world affairs or see those ideals lost. (1939, Vol. III, p. 513.)

These volumes exhibit the usual high standards of editing to be found in *Foreign Relations*. It is especially lamentable that the last cumulative index for this set ends with the year 1918. The publication of an up-to-date cumulative index would be an invaluable aid in the utilization of this documentary material.

ROBERT E. CLUTE

Conférence de la Haye de Droit International Privé. Vol. I: Actes de la Huitième Session, 3 au 24 Octobre 1956. pp. xxxii, 359; Vol. II: Documents relatifs à la Huitième Session. pp. xii, 243. The Hague: Imprimerie Nationale, 1957.

The Permanent Bureau of the Hague Conference on Private International Law has brought out in two large volumes the Proceedings and Preliminary Papers of the Eighth Session of the Conference which took place in October, 1956. From an editorial point of view, the volumes are masterpieces, fruit of a tradition of long standing and demonstration, if demonstration need be, of the advantage of having international conference matters of this difficult type handled by a specialized permanent agency. Whoever is in need of information on work done at the Hague Conference will find it easily and properly presented in the "*Actes*" and "*Documents*." He does not have to hunt for mimeographed materials which may, or may not, be found at a depositary of United Nations materials. This is quite different from the unfortunate practice of the United Nations of not necessarily printing conference materials, as, for example in the case of the United Nations Conference on Maintenance Obligations.

At the Eighth Session of the Hague Conference, which the volumes under review cover, four draft conventions were produced, two on conflicts problems in the field of international sales of goods, the convention on the law governing transfer of title and the convention on the jurisdiction of the selected forum, and two conventions concerned with questions of support of minor children. Of the latter, the convention on the law

applicable to obligations to support minor children, was signed in support of or behalf of several of the countries represented at the Conference. The other draft convention is on recognition and enforcement of orders for support. Whoever works in these fields will have to turn to the volumes for information. It can only be regretted that the materials are made available exclusively in French, the official language of the Conference. It should be contrary to the interests of the Conference, for its influence is automatically restricted.

The United States Government was, for the first time, represented at a session of the Hague Conference through an observer delegation. The proceedings show that the observers played a minor rôle in the discussions of the drafts. On the other hand, they raised a basic question, the "method," whether the Conference should not consider use of its method of uniform and model legislation, in addition to drafting international conventions. The discussion (beginning at page 266 of the "Notes") shows that only the delegates of the United Kingdom supported the suggestion and that the Conference decided not to take a vote on this question at that session. The settlement of the question may have far-reaching consequences on the prospects for international unification work in the field of private international law. May we hope that this part of the discussion will be made available in English by interested groups.

KURT H. NADELMANN

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* A translation of the four draft conventions has appeared in 5 Am. J. Comp. Law 353 (1953).

* Mention here neither assures nor precludes later review.

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OFFICIAL DOCUMENTS

CONVENTION CONCERNING CUSTOMS FACILITIES FOR TOURING

*Opened for Signature at the Headquarters of the United Nations,
New York, June 4, 1954; in force September 11, 1957 **

THE CONTRACTING STATES, *Desiring* to facilitate the development of international touring,
Have decided to conclude a Convention and have agreed as follows:

ARTICLE 1

For the purpose of this Convention:

(a) The term "import duties and import taxes" shall mean not only Customs duties but also all duties and taxes whatever chargeable by reason of importation;

(b) The term "tourist" shall mean any person without distinction as to race, sex, language or religion, who enters the territory of a Contracting State other than that in which that person normally resides and remains there for not less than twenty-four hours and not more than six months in the course of any twelve-month period, for legitimate non-immigrant purposes, such as touring, recreation, sports, health, family reasons, study, religious pilgrimages or business;

* Treaties and Other International Acts Series, No. 3879. The convention has been ratified by the following states: Austria, Belgium, Cambodia, Ceylon, Egypt, Federal Republic of Germany, Haiti, Italy, Japan, Luxembourg, Mexico, Sweden, Switzerland, United Kingdom, and the United States.

Instruments of accession have been deposited by Canada, Denmark, Israel, Hashemite Kingdom of Jordan, Morocco, and Viet-Nam. The accession by Denmark was accompanied by the following reservation (*translation*):

"Notwithstanding the provisions of Article 3 of this Convention, the Scandinavian countries shall be permitted to make special rules applicable to persons residing in those countries."

In the case of the Federal Republic of Germany, the convention is also applicable to Land Berlin.

In the case of the United Kingdom, notification was given on Aug. 7, 1957, of the application of the convention to North Borneo, Cyprus, Fiji, Jamaica, Federation of Malaya, Seychelles, Sierra Leone, Singapore, Somaliland Protectorate, Tonga, Zanzibar, and Malta, subject to the reservation with respect to Malta that the definition of "personal effects" contained in par. 3 of Art. 2 of the convention shall not include "one portable wireless receiving set"; notification was received on Jan. 14, 1958, of the application of the convention to Brunei, Antigua, Mauritius, Sarawak, Dominica, Bermuda, Gambia, Montserrat, Federation of Nigeria, British Solomon Islands Protectorate, Gibraltar, Virgin Islands, St. Helena, Grenada, and St. Vincent.

(c) The term "temporary importation permit" shall mean the Customs document testifying to the guarantee or deposit of import duties and import taxes chargeable in the event of failure to re-export the article temporarily imported.

ARTICLE 2

1. Subject to the other conditions laid down in this Convention, each of the Contracting States shall admit temporarily free of import duties and import taxes the personal effects imported by a tourist, provided they are for the personal use of the tourist, that they are carried on the person of or in the luggage accompanying the tourist, that there is no reason to fear abuse, and that these personal effects will be re-exported by the tourist on leaving the country.

2. The term "personal effects" shall mean all clothing and other articles new or used which a tourist may personally and reasonably require, taking into consideration all the circumstances of his visit, but excluding all merchandise imported for commercial purposes.

3. Personal effects shall include among other articles the following, provided that they can be considered as being in use:

personal jewellery;
one camera with twelve plates or five rolls of film;
one miniature cinematograph camera with two reels of film;
one pair of binoculars;
one portable musical instrument;
one portable gramophone with ten records;
one portable sound-recording apparatus;
one portable wireless receiving set;
one portable typewriter;
one perambulator;
one tent and other camping equipment;
sports equipment (one fishing outfit, one sporting firearm with fifty cartridges, one non-powered bicycle, one canoe or kayak less than 5½ metres long, one pair of skis, two tennis racquets, and other similar articles).

ARTICLE 3

Subject to the other conditions laid down in this Convention each of the Contracting States shall admit free of import duties and import taxes the following articles imported by a tourist for his personal use, provided that these articles are carried on the person of or in the hand luggage accompanying the tourist, and provided that there is no reason to fear abuse:

(a) 200 cigarettes or 50 cigars or 250 grammes of tobacco, or an assortment of these products, provided that the total weight does not exceed 250 grammes;

(b) one regular-size bottle of wine and one-quarter litre of spirits;

(c) one-quarter litre of toilet water and a small quantity of perfume.

ARTICLE 4

Subject to the other conditions laid down in this Convention each of the Contracting States shall grant to the tourist, provided that there is no reason to fear abuse:

(a) authorization to import in transit and without a temporary importation permit, travel souvenirs for a total value not exceeding 50 U.S.A. dollars, provided that such souvenirs are carried on the person of or in the luggage accompanying the tourist and that they are not intended for commercial purposes;

(b) authorization to export, without the formalities applying to currency controls and free of export duties, travel souvenirs which the tourist has bought in the country for a total value not exceeding 100 U.S.A. dollars, provided that they are carried on the person of or in the luggage accompanying the tourist and that such souvenirs are not intended for commercial purposes.

ARTICLE 5

Each of the Contracting States may require a temporary importation permit in respect of articles of a high value covered by article 2.

ARTICLE 6

The Contracting States shall endeavour not to introduce Customs procedures which might have the effect of impeding the development of international touring.

ARTICLE 7

In order to expedite Customs procedures, contiguous Contracting States shall endeavour to place their respective Customs posts close together and to keep them open during the same hours.

ARTICLE 8

The provisions of this Convention shall not prejudice in any way the application of police or other regulations concerning the importation, possession and carrying of arms and ammunition.

ARTICLE 9

Each of the Contracting States recognizes that any prohibitions which that state imposes on the importation or exportation of articles which benefit under this Convention shall apply only in so far as they are based on considerations other than economic in character, for example, of public morality, public security, public health, hygiene, veterinary or phytopathological considerations.

ARTICLE 10

The exemptions and facilities provided by this Convention shall not apply to frontier traffic.

Nor shall the applications of these exemptions and facilities be considered as automatic:

(a) when the total quantity of a commodity to be imported by a tourist exceeds substantially the limit laid down in this Convention;

(b) in case of a tourist who enters the country of import more than once a month;

(c) in case of a tourist under 17 years of age.

ARTICLE 11

In the event of fraud, contravention or abuse the Contracting States shall be free to take proceedings for the recovery of the corresponding import duties and import taxes and also for the imposition of any penalties to which the persons who have been granted exemptions or other facilities may have rendered themselves liable.

ARTICLE 12

Any breach of the provisions of this Convention, any substitution, false declaration or act having the effect of causing a person or an article improperly to benefit from the system of importation laid down in this Convention, may render the offender liable in the country where the offence was committed to the penalties prescribed by the laws of that country.

ARTICLE 13

Nothing in this Convention shall prevent Contracting States which form a Customs or economic union from enacting special provisions applicable to residents of the states forming that union.

ARTICLE 14

1. This Convention shall be open for signature until 31 December 1954 on behalf of any State Member of the United Nations and any other state invited to attend the United Nations Conference on Customs Formalities for the Temporary Importation of Private Road Motor Vehicles and for Tourism held in New York in May and June 1954, hereinafter referred to as the Conference.

2. This Convention shall be subject to ratification and the instruments of ratification shall be deposited with the Secretary-General of the United Nations.

ARTICLE 15

1. From 1 January 1955 this Convention shall be open for accession by any state referred to in paragraph 1 of Article 14 and any other state so invited by the Economic and Social Council of the United Nations. It

shall also be open for accession on behalf of any Trust Territory of which the United Nations is the Administering Authority.

2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

ARTICLE 16

1. This Convention shall enter into force¹ on the ninetieth day following the date of the deposit of the fifteenth instrument of ratification or accession either without reservation or with reservation accepted in accordance with Article 20.

2. For each state ratifying or acceding to the Convention after the date of the deposit of the fifteenth instrument of ratification or accession in accordance with the preceding paragraph, the Convention shall enter into force on the ninetieth day following the date of the deposit by such state of its instrument of ratification or accession either without reservation or with reservations accepted in accordance with Article 20.

ARTICLE 17

1. After this Convention has been in force for three years, any Contracting State may denounce it by so notifying the Secretary-General of the United Nations.

2. Denunciation shall take effect fifteen months after the date of receipt by the Secretary-General of the United Nations of the notification of denunciation.

ARTICLE 18

This Convention shall cease to have effect if, for any period of twelve consecutive months after its entry into force, the number of Contracting States is less than eight.

ARTICLE 19

1. Any state may, at the time of the deposit of its instrument of ratification or accession or at any time thereafter, declare by notification addressed to the Secretary-General of the United Nations that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. The Convention shall extend to the territories named in the notification as from the ninetieth day after its receipt by the Secretary-General if the notification is not accompanied by a reservation, or from the ninetieth day after the notification has taken effect in accordance with Article 20, or on the date on which the Convention enters into force for the state concerned, whichever is the later.

2. Any state which has made a declaration under the preceding paragraph extending this Convention to any territory for whose international relations it is responsible may denounce the Convention separately in respect of that territory in accordance with the provisions of Article 17.

¹ Sept. 11, 1957.

ARTICLE 20

1. Reservations to this Convention made before the signing of the Final Act¹ shall be admissible if they have been accepted by a majority of the members of the Conference and recorded in the Final Act.

2. Reservations made after the signing of the Final Act shall not be admitted if objection is expressed by one-third of the Signatory States or of the Contracting States as hereinafter provided.

3. The text of any reservation submitted to the Secretary-General of the United Nations by a state at the time of the signature, the deposit of an instrument of ratification or accession or of any notification under Article 19 shall be circulated by the Secretary-General to all states which have at that time signed, ratified or acceded to the Convention. If one-third of these states expresses an objection within ninety days from the date of circulation, the reservation shall not be accepted. The Secretary-General shall notify all states referred to in this paragraph of any objection received by him as well as of the acceptance or rejection of the reservation.

4. An objection by a state which has signed but not ratified the Convention shall cease to have effect if, within a period of nine months from the date of making its objection, the objecting state has not ratified the Convention. If, as the result of an objection ceasing to have effect, a reservation is accepted by application of the preceding paragraph, the Secretary-General shall so inform the states referred to in that paragraph. The text of any reservation shall not be circulated to any signatory state under the preceding paragraph if that state has not ratified the Convention within three years following the date of signature on its behalf.

5. The state submitting the reservation may, within a period of twelve months from the date of the notification by the Secretary-General referred to in paragraph 3 that a reservation has been rejected in accordance with the procedure provided for in that paragraph, withdraw the reservation, in which case the instrument of ratification or accession or the notification under Article 19 as the case may be shall take effect with respect to such state as from the date of withdrawal. Pending such withdrawal, the instrument or the notification as the case may be, shall not have effect unless, by application of the provisions of paragraph 4, the reservation is subsequently accepted.

6. Reservations accepted in accordance with this article may be withdrawn at any time by notification to the Secretary-General.

7. No Contracting State shall be required to extend to a state making a reservation the benefit of the provisions to which such reservation applies. Any state availing itself of this right shall notify the Secretary-General accordingly and the latter shall communicate this decision to all signatory and Contracting States.

¹ Not printed.

ARTICLE 21

1. Any dispute between two or more Contracting States concerning the interpretation or application of this Convention shall so far as possible be settled by negotiation between them.

2. Any dispute which is not settled by negotiation shall be submitted to arbitration if any one of the Contracting States in dispute so requests and shall be referred accordingly to one or more arbitrators selected by agreement between the states in dispute. If within three months from the date of the request for arbitration the states in dispute are unable to agree on the selection of an arbitrator or arbitrators, any of those states may request the President of the International Court of Justice to nominate a single arbitrator to whom the dispute shall be referred for decision.

3. The decision of the arbitrator or arbitrators appointed under the preceding paragraph shall be binding on the Contracting States concerned.

ARTICLE 22

1. After this Convention has been in force for three years, any Contracting State may, by notification to the Secretary-General of the United Nations, request that a conference be convened for the purpose of reviewing the Convention. The Secretary-General shall notify all Contracting States of the request and a review conference shall be convened by the Secretary-General if, within a period of four months following the date of notification by the Secretary-General, not less than one-half of the Contracting States notify him of their concurrence with the request.

2. If a conference is convened in accordance with the preceding paragraph, the Secretary-General shall notify all Contracting States and invite them to submit within a period of three months such proposals as they may wish the conference to consider. The Secretary-General shall circulate to all Contracting States the provisional agenda for the conference together with the texts of such proposals at least three months before the date on which the conference is to meet.

3. The Secretary-General shall invite to any conference convened in accordance with this article all Contracting States and all other states Members of the United Nations or of any of the specialized agencies.

ARTICLE 23

1. Any Contracting State may propose one or more amendments to this Convention. The text of any proposed amendment shall be transmitted to the Secretary-General of the United Nations who shall circulate it to all Contracting States.

2. Any proposed amendment circulated in accordance with the preceding paragraph shall be deemed to be accepted if no Contracting State expresses an objection within a period of six months following the date of circulation of the proposed amendment by the Secretary-General.

3. The Secretary-General shall notify as soon as possible all Contracting States whether an objection to the proposed amendment has been ex-

expressed, and if no such objection has been expressed, the amendment shall enter into force for all Contracting States three months after the expiration of the period of six months referred to in the preceding paragraph.

ARTICLE 24

The Secretary-General of the United Nations shall notify all Member States of the United Nations and all other states invited to attend the Conference of the following:

- (a) Signatures, ratifications and accessions, received in accordance with Articles 14 and 15;
- (b) The date upon which this Convention shall enter into force in accordance with Article 16;
- (c) Denunciations received in accordance with Article 17;
- (d) The abrogation of this Convention in accordance with Article 18;
- (e) Notifications received under Article 19;
- (f) Entry into force of any amendment in accordance with Article 23.

ARTICLE 25

The original of this Convention shall be deposited with the Secretary-General of the United Nations who shall transmit certified copies thereof to all Members of the United Nations and all other states invited to the Conference.

IN WITNESS WHEREOF the undersigned, being duly authorized thereto, have signed this Convention.

DONE at New York, this fourth day of June one thousand nine hundred and fifty four, in a single copy in the English, French and Spanish languages each text being equally authentic.

The Secretary-General is requested to prepare an authoritative translation of this Convention in the Chinese and Russian languages and to add the Chinese and Russian texts to the English, French and Spanish texts when transmitting certified copies thereof to the states in accordance with Article 25 of this Convention.

Here follow signatures on behalf of Argentina (ad referendum), Austria, Belgium (subject to ratification), Cambodia, Ceylon, Cuba, Dominican Republic (ad referendum), Ecuador, Egypt (with reservation),¹ France, Federal Republic of Germany, Guatemala (with reservation),² Haiti (with

¹ The reservation is as follows:

"The Delegation of Egypt reserves its Government's right to withhold the advantages provided for by the Convention concerning Customs Facilities for Touring from any person who, while visiting Egypt as a tourist, takes up employment with or without pay."

² The reservation is as follows:

"The Guatemalan Government reserves the right:

"(1) Not to consider as tourists persons who enter the country for business as provided in article 1;

"(2) Not to accept the provisions of article 19 in respect of territories in dispute which are under the *de facto* administration of another State."

reservation),³ Italy, Mexico, Monaco, The Netherlands, Panama (ad referendum), Philippine Republic, Portugal (ad referendum), Spain (ad referendum), Sweden (with reservation),⁴ Switzerland, United Kingdom, United States, Uruguay (ad referendum), Vatican City. The convention was subsequently signed on behalf of Costa Rica, Honduras, India, Japan and Luxembourg.]

Note by the Department of State

A. The following statement, signed by the Belgian Minister for Foreign Affairs, relating to the application of the Convention to the Territories of the Belgian Congo and Ruanda-Urundi, subject to certain reservations to the Convention, was transmitted with the instrument of ratification (*translation*):

"1. In depositing the instruments whereby Belgium ratifies the Convention concerning Customs Facilities for Touring, concluded at New York on 4 June 1954, I have to state that this Convention is applicable to the Territory of the Belgian Congo and to the Trust Territory of Ruanda-Urundi, subject to the following reservations:

"(1) the temporary importation of firearms and their ammunition cannot be considered without a temporary importation document (article 2 of the Convention);

"(2) the exemption in the case of wine, spirits, toilet water and perfume must continue to be limited to opened containers and subject, in the case of alcoholic beverages in particular, to the observance of the legal provisions in force (article 3 of the Convention);

"(3) worked ivory and objects of indigenous art must be excluded from the operation of the Convention (article 4)."

B. The note dated July 25, 1956, transmitting the instrument of ratification of the Convention by the United States of America contained a declaration that the Convention is applicable to the Territories of Alaska, Hawaii, Puerto Rico, and the Virgin Islands.

³ The reservation is as follows:

"The Delegation of Haiti reserves its Government's right to withhold the advantages provided for by the Convention concerning Customs Facilities for Touring from any person who, while visiting Haiti as a tourist, accepts any paid employment or engages in any other form of gainful occupation."

⁴ The reservation is as follows:

"Notwithstanding the provisions of article 3 of the Convention concerning Customs Facilities for Touring, the Scandinavian countries shall be permitted to make special rules applicable to persons residing in those countries."

UNITED STATES

INTERNATIONAL ATOMIC ENERGY AGENCY
PARTICIPATION ACT OF 1957¹

Approved August 28, 1957

AN ACT

TO PROVIDE FOR THE APPOINTMENT OF REPRESENTATIVES OF THE UNITED STATES IN THE ORGANS OF THE INTERNATIONAL ATOMIC ENERGY AGENCY, AND TO MAKE OTHER PROVISIONS WITH RESPECT TO THE PARTICIPATION OF THE UNITED STATES IN THAT AGENCY, AND FOR OTHER PURPOSES.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "International Atomic Energy Agency Participation Act of 1957."

SEC. 2. (a) The President, by and with the advice and consent of the Senate, shall appoint a representative and a deputy representative of the United States to the International Atomic Energy Agency (hereinafter referred to as the "Agency"), who shall hold office at the pleasure of the President. Such representative and deputy representative shall represent the United States on the Board of Governors of the Agency, may represent the United States at the General Conference, and may serve ex officio as United States representative on any organ of that Agency, and shall perform such other functions in connection with the participation of the United States in the Agency as the President may from time to time direct.

(b) The President, by and with the advice and consent of the Senate, may appoint or designate from time to time to attend a specified session or specified sessions of the General Conference of the Agency a representative of the United States and such number of alternates as he may determine consistent with the rules of procedure of the General Conference.

(c) The President may also appoint or designate from time to time such other persons as he may deem necessary to represent the United States in the organs of the Agency. The President may designate any officer of the United States Government, whose appointment is subject to confirmation by the Senate, to act, without additional compensation, for temporary periods as the representative of the United States on the Board of Governors or to the General Conference of the Agency in the absence or disability of the representative and deputy representative appointed under section 2 (a) or in lieu of such representatives in connection with a specified subject matter.

¹ Public Law 85-117, 85th Cong., H.R. 8992; 71 Stat. 453.

(d) All persons appointed or designated in pursuance of authority contained in this section shall receive compensation at rates determined by the President upon the basis of duties to be performed but not in excess of rates authorized by sections 411 and 412 of the Foreign Service Act of 1946, as amended (22 U. S. C. 866, 867), for Chiefs of Mission and Foreign Service officers occupying positions of equivalent importance, except that no Member of the Senate or House of Representatives or officer of the United States who is designated under subsection (b) or subsection (c) of this section as a delegate or representative of the United States or as an alternate to attend any specified session or specified sessions of the General Conference shall be entitled to receive such compensation. Any person who receives compensation pursuant to the provisions of this subsection may be granted allowances and benefits not to exceed those received by Chiefs of Mission and Foreign Service officers occupying positions of equivalent importance.

SEC. 3. The participation of the United States in the International Atomic Energy Agency shall be consistent with and in furtherance of the purposes of the Agency set forth in its Statute¹ and the policy concerning the development, use, and control of atomic energy set forth in the Atomic Energy Act of 1954, as amended. The President shall, from time to time as occasion may require, but not less than once each year, make reports to the Congress on the activities of the International Atomic Energy Agency and on the participation of the United States therein. In addition to any other requirements of law, the Department of State and the Atomic Energy Commission shall keep the Joint Committee on Atomic Energy, the House Committee on Foreign Affairs, and the Senate Committee on Foreign Relations, as appropriate, currently informed with respect to the activities of the Agency and the participation of the United States therein.

SEC. 4. The representatives provided for in section 2 hereof, when representing the United States in the organs of the Agency, shall, at all times, act in accordance with the instructions of the President, and such representatives shall, in accordance with such instructions, cast any and all votes under the Statute of the International Atomic Energy Agency.

SEC. 5. There is hereby authorized to be appropriated annually to the Department of State, out of any money in the Treasury not otherwise appropriated, such sums as may be necessary for the payment by the United States of its share of the expenses of the International Atomic Energy Agency as apportioned by the Agency in accordance with paragraph (D) of Article XIV of the Statute of the Agency, and for all necessary salaries and expenses of the representatives provided for in section 2 hereof and of their appropriate staffs, including personal services without regard to the civil service laws and the Classification Act of 1949, as amended; travel expenses without regard to the Standardized Government Travel Regulations, as amended, the Travel Expense Act of 1949, as amended, and section 10 of the Act of March 3, 1933, as amended; salaries

¹ For text of Statute see 51 A.J.I.L. 466 (1957).

authorized by the Foreign Service Act of 1946, as amended, or as authorized by the Atomic Energy Act of 1954, as amended, and expenses and allowances of personal and dependents as authorized by the Foreign Service Act of 1946, as amended; services as authorized by section 15 of the Act of August 2, 1946 (5 U. S. C. 55a); translating and other services, by contract hire of passenger motor vehicles and other local transportation, printing and binding without regard to section II of the Act of March 4, 1919 (41 U. S. C. 111); official functions and courtesies; such sums as may be necessary to defray the expenses of United States participation in the Preparatory Commission for the Agency, established pursuant to Annex I of the Statute of the Agency; and such other expenses as may be authorized by the Secretary of State.

SEC. 6. (a) Notwithstanding any other provision of law, Executive order or regulation, a Federal employee who, with the approval of the Federal agency or the head of the department by which he is employed, leaves his position to enter the employ of the Agency shall not be considered for the purposes of the Civil Service Retirement Act, as amended, and the Federal Employees' Group Life Insurance Act of 1954, as amended, as separated from his Federal position during such employment with the Agency but not to extend beyond the first three consecutive years of his entering the employ of the Agency: *Provided*, (1) That he shall pay to the Civil Service Commission within ninety days from the date he is separated without prejudice from the Agency all necessary deductions and agency contributions for coverage under the Civil Service Retirement Act for the period of his employment by the Agency, and (2) That all deductions and agency contributions necessary for continued coverage under the Federal Employees' Group Life Insurance Act of 1954, as amended, shall be made during the term of his employment with the International Atomic Energy Agency. If such employee, within three years from the date of his employment with the Agency, and within ninety days from the date he is separated without prejudice from the Agency, applies to be restored to his Federal position, he shall within thirty days of such application be restored to such position or to a position of like seniority, status and pay.

(b) Notwithstanding any other provision of law, Executive order or regulation, any Presidential appointee or elected officer who leaves his position to enter, or who within ninety days after the termination of his position enters, the employ of the Agency, shall be entitled to the coverage and benefits of the Civil Service Retirement Act, as amended, and the Federal Employees' Group Life Insurance Act of 1954, as amended, but not beyond the earlier of either the termination of his employment with the Agency or the expiration of three years from the date he entered employment with the Agency: *Provided*, (1) That he shall pay to the Civil Service Commission within ninety days from the date he is separated without prejudice from the Agency all necessary deductions and agency contributions for coverage under the Civil Service Retirement Act for the period of his employment by the Agency, and (2) That all deductions and agency con-

tributions necessary for continued coverage under the Federal Employees' Group Life Insurance Act of 1954, as amended, shall be made during the term of his employment with the Agency.

(c) The President is authorized to prescribe such regulations as may be necessary to carry out the provisions of this section and to protect the retirement, insurance and such other civil service rights and privileges as the President may find appropriate.

SEC. 7. Section 54 of the Atomic Energy Act of 1954, as amended, is amended by adding the following new sentences: "Unless hereafter otherwise authorized by law the Commission shall be compensated for special nuclear material so distributed at not less than the Commission's published charges applicable to the domestic distribution of such material, except that the Commission to assist and encourage research on peaceful uses or for medical therapy may so distribute without charge during any calendar year only a quantity of such material which at the time of transfer does not exceed in value \$10,000 in the case of one nation or \$50,000 in the case of any group of nations. The Commission may distribute to the International Atomic Energy Agency, or to any group of nations, only such amounts of special nuclear materials and for such periods of time as are authorized by Congress: *Provided, however,* That, notwithstanding this provision, the Commission is hereby authorized subject to the provisions of section 123, to distribute to the Agency five thousand kilograms of contained uranium-235, together with the amounts of special nuclear material which will match in amount the sum of all quantities of special nuclear materials made available by all other members of the Agency to July 1, 1960."

SEC. 8. In the event of an amendment to the Statute of the Agency being adopted in accordance with Article XVIII-C of the Statute to which the Senate by formal vote shall refuse its advice and consent, upon notification by the Senate to the President of such refusal to advise and consent, all further authority under section 2, 3, 4 and 5 of this Act, as amended, shall terminate: *Provided, however,* That the Secretary of State, under such regulations as the President shall promulgate, shall have the necessary authority to complete the prompt and orderly settlement of obligations and commitments to the Agency already incurred and pay salaries, allowances, travel expenses, and other expenses required for a prompt and orderly termination of United States participation in the Agency: *And provided further,* That the representative and the deputy representative of the United States to the Agency, and such other officers or employees representing the United States in the Agency, under such regulations as the President shall promulgate, shall retain their authority under this Act for such time as may be necessary to complete the settlement of matters arising out of the United States participation in the Agency.

Approved August 28, 1957.

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PERSPECTIVES FOR A LAW OF OUTER SPACE

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AND

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The conquest of space has barely begun. Yet the law of space, instead of lagging behind the astronauts as some lawyers fear, is threatening to outstrip the attraction of the earth's gravity. Before legal speculation reaches escape velocity, we should perhaps remind ourselves of the specific problems that may confront us soon, the earthly origin of much of our law, and the earthly ways in which for some time we shall have to continue to think about law in outer space.

I

Let us begin with a glimpse at the possible pattern and conditions of use of outer space and a brief mention of some of the ways in which it can now be foreseen that they may affect our thinking about events on earth, with consequences relevant for the law.¹ Any attempt today to compile a definitive catalogue of the possible uses of outer space would be presumptuous. Such a catalogue would have to be open-ended and loose-leaved: open-ended, because space flight itself will suggest new uses of space (as well as discourage or defer some presently contemplated uses); and loose-leaved, because the sequence in which activities are conducted in space will be a function of many variables including considerations of scientific curiosity, military-strategic policy, and cost.

¹See the books and periodicals on space uses listed in Hogan, "A Guide to the Study of Space Law," P-129, at 10-18 (Rand Corporation, March 1, 1958; to be published in St. Louis Univ. L.J., Spring, 1958); Odishaw, "The Satellite Program for the International Geophysical Year," 35 Dept. of State Bulletin 280 (1956); President's Science Advisory Committee, "Introduction to Outer Space" (hereinafter cited as "Kilham Report") (March 26, 1958); Berkner, "Man's Space Satellites," 41 Bulletin Atomic Scientists 106 (No. 3, March, 1958). A popular symposium treatment is given in 41 Air Force: The Magazine of American Airpower, No. 3 (March, 1958). See also the statement of Dr. Joseph Kaplan, Chairman, U. S. Committee for the International Geophysical Year, National Academy of Sciences, H.Rep. Comm. on Appropriations, Subcommittee on Independent Offices, Report on International Geophysical Year 20-26 (1957); statement of Dr. Richard W. Porter, Chairman, USNC-IGY Technical Panel on the Earth Satellite Program, *ibid.* 68-73; A. N. Nesmeianov, President of USSR Academy of Sciences, "The Problem of Creating an Artificial Earth Satellite," Pravda, June 1, 1957, p. 2.

Among the known uses of satellites already launched, observations of the flights themselves permit inference as to the measurement of atmospheric density at pertinent heights, of the distribution of matter within the earth, and of the shape of the earth and the precise relative location of points on the earth's surface. The addition of a radio beacon emitted from a satellite makes possible the measurement of total ionization in the exosphere (a sub-layer of the atmosphere) by comparing the satellite's radio position with its optical position. Other instrumentation on the satellites has measured, for transmission to the earth, data on atmospheric temperatures, the impact of micrometeorites, and cosmic radiation of various types. On at least one satellite (Explorer III) information has been stored up in instruments and its transmission triggered by radio beams from the earth as the satellite passes over appropriate installations. The second Soviet satellite, as is well known, carried a dog, which survived for a week and (like other animals sent into outer space in rockets by the Soviet Union and the United States) furnished data for the planning of manned flight.²

Future activities in space may be rather suggested than predicted.³ Responsible spokesmen have said that it is not too early to *contemplate* the use of unmanned orbital satellites for radio and television relays,⁴ for photographic observations of weather, and for photographic reconnaissance of events on the earth's surface;⁵ rocket landings on the moon; the

² For the fullest account so far given of the results of experiments conducted on the two Soviet satellites launched in 1957, see "Soviet Artificial Satellites of the Earth," *Pravda*, April 27, 1958, p. 4, giving a preliminary report, largely without numerical measurements, on measurement of orbits, atmospheric density and temperature, composition of the ionosphere, cosmic radiation, and biological effects on the dog carried in the second satellite. See also *N. Y. Times*, May 2, 1958.

³ Besides the sources cited in note 1, see Edson, "Astronautics and the Future," 14 *Bulletin Atomic Scientists* 102 (No. 3, March, 1958); Recommendations of the Technical Panel on the Earth Satellite Program of the U. S. National Committee for the International Geophysical Year, excerpted in *N. Y. Times*, March 20, 1958. But cf. Dr. James Van Allen, Chairman of the Working Group on Internal Instrumentation of the USNC-IGY Technical Panel on the Earth Satellite Program, National Academy of Sciences, testifying before a subcommittee of the House of Representatives in May, 1957: "I might say I do not subscribe to some 99 percent of what is written about this subject—exploration of space—as having any validity." H. Rep. Comm. on Appropriations, Subcomm. on Independent Offices, Report on International Geophysical Year 91 (1957).

⁴ Petrov, "Artificial Satellites of the Earth and the World Telecenter," *Zvezda*, No. 4, pp. 160, 164 (June, 1957). According to Petrov, the notion of using aircraft as relay stations for television was proposed by P. V. Shmakovyi in 1936.

⁵ The U. S. Air Force reported in January, 1958, that it hoped to launch a military reconnaissance satellite with a recoverable capsule by the Spring of 1959: testimony of Major General Bernard A. Schriever, Commander of Air Force Ballistic Missile Division, before the Sen. Preparedness subcommittee, reported in *N. Y. Times*, Jan. 15, 1958. According to subsequent testimony by the same officer before the House Select Committee on Astronautics and Space Exploration, the project for the development of a reconnaissance satellite had been given top national priority, *N. Y. Times*, April 25, 1958. Unidentified Air Force officials were reported as estimating "that a reconnaissance satellite carrying a telescope forty inches in diameter could detect objects on earth less than two feet in size from an altitude of 500 miles." *Ibid.* The President told the American Society of Newspaper Editors on April 17, 1958, that a reconnais-

the use of scientific instruments on the moon in working condition; manned flight in an orbital satellite that can return its human passenger alive to the earth; manned flight to the vicinity of the moon and back; and the use of outer space for part of the trajectory of peaceful missiles, including (say) mail or cargo between distant points on earth. Many

other speculation concerns the establishment of space platforms; the assembly in outer space of large craft for interplanetary exploration; modification of the earth's weather; the acquisition of economic resources, new known or unknown, such as solar energy, new forms of radiation,⁶ and, especially, mineral or other resources that are present, and may eventually become available, on the moon or other celestial bodies; and finally, discussed with all the casualness of a confident scientific era, the encounter with sentient or intelligent beings on other planets.⁷

The patterns of use of outer space will of course unfold in a context of predictions which even now, we suggest, can be identified as being central to the law of space as it develops over the years. Some of these predictions are common to many areas of human conduct and interest, some are, in a measure, peculiar to the use of outer space. Those that are noted below are intended to be illustrative only.

One condition of first importance is the extraordinary interdependence of scientific, military, commercial, and other objectives that may be advanced by the same activities in space. Scientific observations on cosmic radiation may some day serve as a basis for the development of radio-logical warfare. A television relay station may be capable of use to interfere with communications instead of facilitating them. A reconnaissance satellite may be made to yield important economic benefits from services to meteorology. Geodetic observations made by celestial mechanics may improve the accuracy of intercontinental ballistic missiles by making international maps more precise.⁸ For an orbiting satellite carrying a nuclear warhead, it is perhaps not easy to imagine an immediate

space satellite, if successful, "would transmit military information of value to the armed forces." *N. Y. Times*, April 18, 1958. See also Petrov, *loc. cit.* note 4, *supra*, p. 163; Edson, "Astronautics and the Future," 14 *Bulletin Atomic Scientists* 192 at 194-5 (No. 3, March, 1958). Some technical limitations are pointed out in Parsons, "Open Sky Plan in the Atomic Age," *Missiles and Rockets* 78, 80 (June, 1957); Pavilov, "On Applications of the Satellite Vehicle," 26 *Jet Propulsion* 360, 361-362 (No. 5, Pt. 1, May, 1956); "USAF Pushes Pied Piper Space Vehicle," *Aviation Week*, Oct. 14, 1957, p. 26.

⁶ Observations on the two Explorer satellites launched early in 1958 have detected radio waves of unexpected intensity near the apogees of their orbits. *N. Y. Times*, May 2, 1958.

⁷ See the papers reprinted in "Man in Space: A Tool and Program for the Study of Social Change," 72 *Annals N. Y. Acad. Sci.* 165-214 (1958); Haley, "Space Law: A Preliminary Synoptic View," paper presented at the 7th Annual Congress of the International Astronautical Federation, Sept. 19, 1956; Cox and Stoiko, *Space Law* 77 (1958).

⁸ C. I. Furukov, "Determining the Position of a Ship by Means of an Earth Satellite," *Sovetsky Flot*, Dec. 21, 1957, p. 3, quoted in 9 *Current Digest of the Soviet Press* 23 (No. 52, 1958).

commercial or scientific use that would not be served more efficiently by some other device, but it would be rash to say that no such use is possible.

By reason of this interdependence, it may be difficult to apply some well-known legal techniques—prohibition, conditional permission, allocation of responsibility for damage, regulation, and so on—on the basis of supposed predominant category of use. If we want certain benefits we may have to accept certain risks. Especially in the preliminary exploratory stage (which may last for generations), we may have to stress those aspects of legal control that permit and encourage development, while doing our best to measure the size of the risk to which we are being exposed. This does not mean that we ought to reject the possibility of reaching, or at least talking about, an agreement to outlaw certain uses of outer space, for the marginal gains to be expected from those uses may not be worth their price; but it does imply that it will not be easy to define “peaceful purposes” or “scientific purposes” without risk of hampering activities that have multiple uses.

A second feature in the setting is established by the relation between activities in space and the international political situation; that is, the structure of the earth arena, the position and number of Powers, their relative technological success, and expectations of violence. The only Powers that have so far (to the best of our knowledge) succeeded in throwing a ball or a can into outer space are the same two Powers around which the nations of the earth have been observed to cluster in the well-known postwar “bipolarity.” In the short run, the gap between the most powerful and the least powerful nations, between the technologically most advanced and the technologically least advanced, will seem to widen, and the visible orbiting satellites furnish a spectacular evidence of the widening gap. Yet the gap will be closed, though by the time it is closed it may be obsolete to speak of competing national state systems at all. Even before that time comes, the political effects of achievement in space may be the reverse of the technological effect. As the lessons of space prowess are driven home to the peoples of the earth, the Big Two may find that they must pay not less but more attention to the reactions and drives of the less powerful nations; that they must redouble their coupled assurances of the possession of strength and the resolution not to use it except under extreme provocation; that they must pursue their quest of international support in the formal and informal fora of world public opinion. Thus, under today’s conditions, each accretion of power to the two contending systems of world order, thrusting still heavier responsibilities on those who wield that power, may paradoxically increase the trend toward multipolarity, uplifting the weak and casting down the strong. This, however, is not to say that outer space is destined to be controlled by the world (earth) community or that the nation states with effective power in outer space can be expected or should be required in the interest of that community automatically to relinquish it to any particular international organization.

A third feature of the factual setting relates to the changing relative

distance and time. It is possible that achievement of space will tend to diminish the importance of space in the positional sense and increase the importance of time for the planning of human activities. In military planning, to take one example, the threat of attack from orbit may reduce the intervals available for self-protection by sheltering and thus increase the urgency of inspection and patrol. The importance of this fact for law is indicated by the existence of the Arctic Identification Zones, scores of miles out over the high seas, which reduce the age of space by several years.⁹ In terms of location the Arctic high seas are not United States "territory"; but in time the United States has a legitimate claim, as would other nations, in such circumstances, to check on suspicious activities that are carried out so few minutes (rather than so few miles) away from American shores.

A somewhat different aspect of the importance of time to the law of space is the interrelation of the sequences of various pertinent processes. From the evolution of legal analysis, the course of exploration, the development of space technology and engineering on earth, the cultural effects of space activities on cultural attitudes, and the progress or regress of our social, political, and economic institutions.¹¹ All these processes will take time, and their shifting concatenation will affect contemporary policy. Still another aspect of time is presented by the possibility that events on board spacecraft will be measured, so to speak, by a clock that to an observer on earth would seem to run more slowly than our terrestrial clock, and that men, like clocks, may "age" more slowly on space trips than on earth.¹²

II

The first few orbital satellites launched by the Soviet Union and the United States in connection with the International Geophysical Year program present in themselves no grave threat to international order. Yet the bare facts of the achievement are so spectacular, the implications for military technology so portentous, and the possible consequences for other dimensions of human action so numerous and significant and in part so unpredictable that the volume of legal writing on control or regulation of

⁹ K. L. in, *The Legal Status of the Airspace in the Light of Progress in Aviation and Astronautics* 5 (1957); McDougal and Burke, "Crisis in the Law of the Sea," 67 *Yale Law J.* 539, 583 (1958); Martial, "State Control of the Air Space Over the Arctic Sea and the Contiguous Zone," 30 *Canadian Bar Rev.* 245 (1952).

¹⁰ Cf. the U. S. proposal for a zone of inspection in the Arctic, laid before the U.N. Security Council on April 29, 1958, and the counter-resolution submitted by the U.S.S.R. *N. Y. Times*, April 30, 1958, p. 10.

¹¹ L. K. Frank, "Cultural Implications of Man in Space," 72 *Annals N. Y. Acad. Sci.* 115 (1958).

¹² Killian Report, p. 7; Clarke, *The Exploration of Space* 176-177 (1953).

¹³ Objectives to be served by space exploration as expressed by government spokesmen in the United States and the Soviet Union have been limited to scientific knowledge. The Killian Report mentions curiosity, defense, prestige, and the acquisition of scientific knowledge. The President's message to Congress dated April 10, 1958, proposing the creation of a National Aeronautics and Space Agency, was confined

activities in space has grown rapidly. The increased testing of missiles whose trajectory reaches very high altitudes, and the possibility that such missiles fitted with nuclear warheads will soon have achieved operational capability and numbers, have contributed to the sense of urgency and to the elaboration of a spate of random proposals, extrapolated from poorly evaluated contexts and unrealistic in terms of probabilities.

Most legal writers discussing the legal regime of outer space have proceeded from absolute notions of airspace sovereignty and have felt it necessary to establish a boundary between outer space and airspace.¹⁴ They have proposed various schemes, some of which will be mentioned below, for the zonal division of space. They appear to have assumed, not always explicitly: (1) that present legal arrangements for use of conventional airspace would be unaffected by the arrangements adopted for outer space; (2) that the arrangements adopted for outer space must differ substantially from those adopted for airspace; (3) that outer space must have a legal "status" which could be discovered or agreed upon;¹⁵ (4) that for this purpose it was necessary to fix a single boundary in terms of location; (5) that the establishment of such a boundary was possible without serious regard to physical facts (except those used in the establishment of the boundary itself), present and future technological developments, the functions of spacecraft, or the purposes of space activities.

The problems presented by man's entry into space appear to others to offer an opportunity to fortify international organizations and expand their jurisdiction. Proposals for legal control in the altitudes above the chosen boundaries have centered round the United Nations, or some other present or proposed international organization, as preferred or even exclusive owner of outer space, operator of spacecraft, prescriber of "law" for events in space, forum for preparation of an international convention to prescribe such a "law," or research agency for outer space.¹⁶

to recommendations for administrative machinery in aid of these objectives; see N. Y. Times, April 3, 1958. A proposal made on March 15, 1958, by the Ministry of Foreign Affairs of the U.S.S.R. linked the use of nuclear power and the exploration of outer space and stressed the "opportunities for the joint study and harnessing of the still unexplored forces of nature" by way of preamble. N. Y. Times, March 16, 1958.

¹⁴ See the sources cited in Section V below.

¹⁵ To suppose that there is a "legal status of space" involves as much reification as to suppose that there is a single "freedom of the seas." In both cases the question to be asked is, rather, What legal consequences should be entailed by certain activities in order that they be accommodated with other activities under given policies? Nor will legal analysis be advanced by distinguishing between jurisdiction over space and jurisdiction over activities in space, or by suggesting that "the first legal problem of the space age, and of most immediate concern . . . is the question of who owns space." Hon. K. B. Keating (Rep., N. Y.), "The Law and the Conquest of Space," address before N. Y. State Bar Ass'n., Jan. 31, 1958, p. 6. Cf. Matéesco, "A qui appartient le milieu aérien?", 12 Rev. du Barreau de la Prov. de Québec 227, 239 (1952), concluding that the attempt to determine the legal status of airspace should be abandoned.

¹⁶ See Knauth, Legal Problems of Outer Space in Relation to the United Nations 13 (1958); Committee to Study the Organization of Peace, Strengthening the United Nations 218-219 (1957); Cooper, "Missiles and Satellites: The Law and Our National Policy," 44 A. B. A. Journal 317, 321 (1958).

included the proposals have included lists of doctrinal topics that the view of the compilers should be handled by international agreement; recommendations for "a permanent UN space police organization, to prevent any space dispute";¹⁸ anticipation of "the sharing of responsibility through the United Nations if possible, for the pacific development of primitive extraterrestrial populations";¹⁹ and suggestions, advanced by Senator Wiley of Wisconsin in February, 1958,²⁰ and repeated, with slight modification but without attribution, by the Soviet Foreign Ministry in March, for a new international scientific organization on problems of outer space.

Later we shall attempt to offer a brief appraisal of proposed organizational arrangements for control of activities in outer space, the proposed doctrinal content of space "law," and the proposed geographical limit of its application, and to suggest by anticipation the past experience which may come to be considered most influential in the evolution of space law. Before undertaking this, we think it indispensable to survey, not only in outline, the probable specific controversies that may arise with respect to uses of outer space, that is, the claims that will be made by various participants to engage in, or prescribe or apply authority to, the use and exploitation of outer space, and the probable processes of earth-bound decisions by which such controversies may be resolved. If we bear in mind also the likelihood of changes through time in all pertinent variables—the pattern of use, the relevant surrounding conditions, the character of controversies, and the processes of resolution—we may hope to arrive at an orientation and a perspective that bear some relation to reality, and to submit tentative recommendations for policies in the interest of the general community.

III

The first task is to outline the probable course of future controversy. The initial question here is: Who, in the fairly near future, will make claims to act in outer space without interference from others on the earth, to restrain others from acting in certain ways in outer space, or to prescribe and apply policy to events in outer space? Probably the principal actors will be nation states; it is they—and not many of them—who will possess the necessary rocketry and mobilize the necessary funds. Private entities within a nation state, or private entities in two or more states acting as joint adventurers, may marshal the funds necessary for

¹⁸ Jenks, "International Law and Activities in Space," 5 *Int. and Comp. Law Q.* 99, 102-102 (1956).

¹⁹ Cox, "International Control of Outer Space," *Missiles and Rockets*, June, 1957, p. 71.

²⁰ Lasswell, "Men in Space," 72 *Annals N. Y. Acad. Sci.* 180, 191 (1958). For perceptive anticipation of some of the more important controversies, see Lasswell, "The Political Science of Science," 50 *Am. Pol. Sci. Rev.* 961, 971 (1956).

²¹ Wiley, "Challenges, Old and New, in the Space Age: The Need for an International Space Organization," address prepared for delivery at Georgetown University, Washington, D. C., Feb. 24, 1958 (mimeo.).

²² *N. Y. Times*, March 16, 1958.

commercial or scientific activities in outer space, though they probably would depend upon the launching facilities of national governments. It is conceivable that an undertaking in space may be a joint effort of several types of participants: national governments might provide the launching facilities and specify certain uses of the satellite; private, commercial, or scientific organizations (national or trans-national) might finance certain uses, prepare and control some of the instrumentation, and claim some control over the resources produced by that portion of the activity that they had financed and planned. International (regional or global) organizations will also claim to be able to act in outer space, though difficulties of financing under present conditions may preclude important activity under such auspices unless new types of arrangements are devised. International organizations, as well as nation states without present launching capability, are already, of course, active in the assertion of claims to prescribe and apply policy to events in outer space.

The objectives to be sought by these claimants will not differ, except in modality and proportion, from objectives of the same types of claimants in respect of the use of conventional airspace or the use of the sea. To the extent that the élites of the nation-state claimants can act, whether consciously or unconsciously, appropriately to maximize gains and minimize losses, they can be expected to seek to extend their power and promote their security not only by developing direct weapons uses, but also, and perhaps much more significantly, by increasing the knowledge and skills at their disposal; by enhancing the prestige and respect that they enjoy in the community of nations; and by increasing wealth that may ultimately become available as a consequence of the enlargement of resource environment and the advance of technology. Nation states lacking an early prospect for the capacity to engage in space activity may be expected to seek protection, through alliances or action of the international community, from real or fancied threats of attack; to seek a share of whatever resources are produced by activities in space; and to seek access to the knowledge and skills developed by space activities. In a different epoch it might have been expected that some states, or some important organized forces, would react to man's entry into outer space (had that entry been possible in that epoch) by attempts to discourage the activity of others in that direction, but contemporary culture makes it unlikely that states will harbor, or at least express, attitudes of hostility, either monopolistic or obscurantist.

Some of the conditions under which these objectives will be sought by these claimants have been sketched above: the interdependence of different types of objectives, the competing trends toward bipolarity and multipolarity, and the increasing importance of the temporal dimension for the process of claim and decision. Only the course of future events can disclose the exact nature of changes that may be expected in these and other conditions, such as the progress and spread of space technology, the type and richness of the resources actually made available for exploitation in outer spaces, the possibilities of destructive impact (deliberate or

on the earth; possibilities for surveillance of activities on earth from space; fluctuations in effective relations between contending systems of order among states; fluctuating expectations of early or substantial violence on the earth; possibilities for defense against, or destruction of, objects launched into outer space; and indirect consequences of space activities, like changes in the pattern of technical education, changes in the degree to which economic activity in industrialized countries becomes increasingly capital-intensive, and changing conceptions of the place of man (or God) in the universe.

The condition of the use of space that has immediate relevance for the process of claims with respect to that use is the degree to which the resources of space, in the broadest sense of the term "resources," activities being shared. Space can be used for the simultaneous flight of more than one craft, for instance, though in time some rules of the road will have to be created. Scientific observations of cosmic rays, storm patterns, air density, meteor showers, and the like, can be carried on by many different satellites at the same time. Television relay stations could, apart from considerations of cost, be put up by separate and even competing Powers. The other planets in our solar system, and the moon, can at some point in time be visited by exploratory manned or unmanned rockets launched by more than one Power.

Such uses may be called sharable, or inclusive; they permit similar activity by others without the necessity of more than minor accommodations. It is true that some of the results of some of these activities cannot be shared. For example, if the planet Venus proves to be enveloped by a cloud of petroleum and if a means is devised for bringing the petroleum back to the earth or for fueling vehicles with it, the same oil probably cannot be used in more than one engine. Again, pictures or other records of information obtained by reconnaissance may be transmitted to a number of different receivers or may be reserved by various devices until they reach a single intended receiver, and in some easily imaginable circumstances the value of such information—like the value of a diamond—may vary with its scarcity. Nevertheless, the underlying activity is sharable in the same way as many can fish, though the catch be severally appropriated.

Most claimants, while asserting their own rights to engage in such sharable activities, will probably acknowledge or at least not deny that others may do the same.²² Like many traditional claims in public and private international law, these claims will carry a promise of reciprocity, even based wherever possible with latent or expressed threats of retaliation or reprisal if the complementary promise is dishonored. This pattern of reciprocity-tolerated access to outer space for sharable or inclusive uses may be restricted by the attempt to ensure the public order of the world community through devices providing security from military attack, or

²² Cf. Secretary of State Dulles, speaking at a news conference on the Soviet protests made against balloon overflights: "In the main, it is a recognized practice to avoid putting up into the air anything which could interfere with any normal use of the air by anybody else." N. Y. Times, Feb. 8, 1956.

venting or at least making difficult the activities of unaccountable (flagless) space objects or spacecraft (to be compared with measures against piracy on the high seas), and imposing rules of the road.

The emphasis on mutual tolerance of sharable uses of outer space may seem belied by the history of activities in airspace. Low-altitude flight in the air is sharable in the same sense as is flight at higher altitudes, though there is less "room"; weather balloons can take readings without necessarily interfering with the taking of similar readings by other people's weather balloons; and so on. Yet, ever since the legal positions hardened after the end of the first World War, most underlying national states claimed for themselves the right in their discretion to exclude others, or impose conditions upon the activity of others.²³ For motives of defense as well as economic protection or aggrandizement, the nations of the earth will probably continue to claim the exclusive control of the use of their superjacent airspace. We do not expect that a pattern of the shared use of outer space will in the near future be imitated in the airspace. To the extent that conventional aviation may be superseded by space flight, the pattern of exclusivity may lose much of its importance, but this development seems to be rather far in the future, with the possible exception of postal rockets. Even for such rockets, it would seem that the consent of the "target" areas had better be obtained in advance, and the "target" state might be well advised to station its own inspector when the payload is attached to the rocket.

Thus far, in anticipation of possible future controversies, we have suggested that states will probably continue, as in the IGY, to make claims to certain sharable, inclusive uses of outer space, beyond a still undescribed territorial boundary, but that they will probably also continue to demand exclusive control of the use of superincumbent airspace. In addition, it may be expected that as technological competence advances, states will, with respect to outer space, as they have with respect to the oceans, lay claim to certain occasional exercises of exclusive authority for the protection of certain special interests, such as security, safety, health, and revenue. Claims may also be made, by or on behalf of nation states not currently possessing space capabilities, for an allocation of authority whereby sharable uses are free to all and exclusive uses are the monopoly of an organization representing the world community. Because of the necessity for distinguishing in both claim and decision between exclusive and inclusive uses, controversies will also focus for a time upon alleged problems in fixing

²³ Goedhuis, "The Air Sovereignty Concept and United States Influence on Its Future Development," 22 *Journal of Air Law and Commerce* 209, 211-216 (1955); Honig, *The Legal Status of Aircraft* 6-9 (1956); Academy of Sciences of U.S.S.R., Institute of Law, *International Law* 318 (Korovin ed., in Russian, 1951); Lisovskii, *International Law* 158-160 (in Russian, 1955); Kislov and Krylov, "State Sovereignty in Airspace," *International Affairs*, No. 3, 1956, pp. 35, 36-39; Lakhtine, "Rights over the Arctic," 24 *A.J.I.L.* 703, 714 (1930). See the Soviet notes to the U. S. Government protesting the launching of balloons that overflew the Soviet Union, *N. Y. Times*, Feb. 6 and 19, 1956.

boundaries and ultimately upon real problems in distinguishing between types of activities.

Other types of controversies can be expected to involve, *inter alia*, claims to share, or to exclude others from sharing, the resources yielded by exploration and research in space, whether in the form of new knowledge and skills, materials or energy derived from space exploration, access to celestial bodies, or effects produced on the earth; claims to regulate and fix responsibility for deprivations inflicted by space activities such as impairment, intended injuries to space objects, pollution, invasion of privacy by means of reconnaissance, effects on weather, or interference with communications;²³ and later, in the era of manned space flight, claims relating to the chartering and licensing of spacecraft, to the nationality or affiliation of spacecraft with the launching state or other organization on the earth, to the regulation of events on board spacecraft that produce consequences of importance to the legal systems of the earth, and to the conduct of certain aspects of any encounters with extraterrestrial life. Each type of controversy thus projected will comprise sets of opposing claims, will be affected by its own unique variables, and will require its own distinct clarification and application of policy.

IV

Having indicated some of the types of prospective controversies between the states of the earth over the use of outer space and the prescription and application of authority to uses of outer space, we turn to consider the ways in which those controversies are likely to be resolved.

The first important question is, again, Who will make the decisions? Since some of the current proposals for space law seem to assume the

²³ The possibility that a satellite sent into outer space could be designed to descend into denser atmosphere was raised in 1956 by Drs. Carl Czajley, James Daniel J. Masson, who reported that new alloys already developed could withstand the maximum temperatures which it was expected that a satellite would attain upon descending into denser atmosphere. Time, Dec. 3, 1956; N. Y. Times, Dec. 2, 1956.

Reports that fragments of satellites already launched (Sputnik I and II) are in a recoverable condition seem to be unconfirmed. At all events, writers, who supposed that a satellite, upon losing altitude, must necessarily "burn up like a meteor" might have reflected that parts of some meteors reach the earth. Cf. "Satellite on the Earth," Agitator (a Soviet periodical), Oct. 1957, pp. 6, 9.

²⁴ "The Federal Communications Commission . . . has received a formal protest that radio transmissions of the Soviet Sputniks have violated global agreements on radio frequency allocation. Under the International Telecommunications Treaty, certain bands are reserved for worldwide use for distress signals and scientific purposes. The unauthorized use of these bands by the Sputniks may have resulted in serious errors of instrument calibration and interference with aircraft radio and radar beacons. This situation will be aggravated, of course, as more Sputniks and baby moons are launched. A conglomeration of satellites transmitting conflicting signals could endanger lives and would make tracking and transmission virtually impossible." R. Keating, *loc. cit.* note 15 above, p. 9. The accuracy of the comment is less important than the fact that the controversy has arisen. According to a Soviet report, it is in the interest of greater precision of measurement that a frequency was selected which would be less subject to ionospheric distortion. Pravda, April 27, 1958, p. 4.

decisions will be made directly by the conscience of mankind, or by some presently mythical global court with universal compulsory jurisdiction, it may be useful to recall that the most influential participants in the process of making authoritative decisions will probably, in the large, remain the officials of nation states—not only those states with outer space capabilities, but also others. The composition of the relevant élites may change in ways that may have importance for the character of their decisions on space claims; scientists and engineers, for example, may exert greater weight in their national councils than they used to, and this change may influence national policy in a direction that may (but need not) be more universalistic and more rational.²⁶ International officials, religious leaders, military technicians, and others may affect decisions on some space issues to a degree not equaled perhaps even by the current controversy over the production, testing, and use of nuclear weapons. Political officials and their legal advisers may find themselves faced by urgent demands for early, formal, comprehensive agreement on a wide range of issues not yet ripe for such treatment; and it may be remarked in parentheses that it will serve some of them right.

It is characteristic of the loose and primitive structure of the contemporary earth arena that many of the nation-state officials who will make the decisions are the same who will be making the claims. The difference in rôle may make a significant difference in self-image, in the length of the time range for the calculation of interest, and in recognition of need for reciprocity; but the objectives of their action as decision-makers will of course in measure overlap the objectives of their action as claimants. They will be, and they will take care to appear to be, concerned for the attainment of some modicum of security: the indefinite postponement of unacceptably destructive violence, the achievement of some stability of expectation as to modes of exercising effective power, the maintenance of public order against hostile or reckless or capricious threats. They will wish to conserve the potentially vast resources of space for the production of the largest net gain in all values, though their respective preferences for the distribution of the gain may be mutually incompatible. They will probably concur in demanding that as many of the uses of outer space as are capable of being shared without serious inconvenience be kept available for sharing. They will seek in various ways to adapt to their existing power objectives the potentialities opened up by the access to the new resource environment; the brave new worlds will not for some time suffice to redress or greatly distort the balance of the old.

The process of decision will similarly be affected by many of the same conditions that are relevant to the process of claim. The distribution of effective power (in the broadest sense) on the earth, reckoned according to numbers of participants, relative strength and leverage, scope and stability of their coalitions or alliances, and expectations of violence from various quarters, will affect the urgency and the content of decision. The

²⁶ See Kistiakovsky, "Science and Our Future," 60 *Harvard Alumni Bulletin* 548, 549 (1958).

changing state of negotiations on disarmament with respect to ballistics, missiles, nuclear weapons, and conventional forces, will affect the perceived importance of agreement on certain areas of outer space activity, the degree of expectable conformity to whatever decision is reached, and the power available to whatever entity will attempt to police the decision. The direction of space efforts and thus the relative importance of decision on various issues will be affected by the understandably growing budgetary ambitions of planners, military and civilian, lay and scientific;²⁷ by the spur to technology given by the challenge of outer space, by the international political appeal of space prowess, and by the conscious deference of the great Powers toward the strength that resides in weakness. The need for speedy decision may be increased by the rise in the number of participants and the gravity of the consequences of action or inaction; the same factors may increase the need for concentration of decision-making functions or, in the alternative, for more successful indoctrination and procedural planning at the periphery.

In many respects the methods by which controversies over the use of outer space will be resolved in the prescription and application of policy can be expected to resemble those by which the law of the sea has evolved; these have recently been described in some detail and need not be rehearsed here.²⁸ In certain important respects, however, they will differ. Thus, changes in the time factor, to which we have already alluded, may make the "intelligence" component of decision more important for the application of law in outer space and of space law on earth than it is for the law of the sea. The recommending function may, as we have suggested above, be characterized by a larger rôle for the scientist and the skilled technician. The disparity between capabilities of less and more powerful nations may precipitate new groupings for the assertion of demands in such bodies as the United Nations.

It is possible, also, that a new emphasis may be placed upon the rôle of explicit agreement in the prescription of policy. Thus, voices are being raised in urgent recommendation that new prescriptions to govern activities in outer space be elaborated by most explicit, formal, comprehensive, and early multilateral agreement.²⁹ Among the motives of this to

²⁷ The head of the U. S. Rocket and Satellite Research Panel of the IGY has testified before a Congressional committee that Congress should appropriate at least \$500,000,000 a year for the National Aeronautics and Space Agency. N. Y. Times, April 29, 1957. The President's Science Advisory Committee referred to a rough estimate of "about a couple of billion dollars, spent over a number of years to equip ourselves to land a man on the moon and to return him safely to earth." Killian Report, p. 11.

²⁸ Zadorozhnyi, "The Artificial Satellite and International Law," *Sovetskaya Rossiya* Oct. 17, 1957, p. 3.

²⁹ McLaughal and Burke, "Crisis in the Law of the Sea: Community Perspective versus National Egoism," 67 *Yale Law J.* 539, 559-565 (1958).

³⁰ E.g. Munro, "Law for the 'Heav'n's Pathless Way,'" N. Y. Times Sunday Magazine, Feb. 16, 1958; Cox, "International Control of Outer Space," *Missiles and Rockets*, June, 1957, pp. 68, 71; B.P.-D., "L'apparition d'engins 'extra-atmosphériques' va exiger l'élaboration d'un 'droit international de l'espace,'" *Le Monde*, Oct. 17, 1957, p. 1; Aaronson, "Earth Satellites and the Law," 220 *Law Times* 115 (Aug. 25,

gency, the fear of military uses probably predominates, though one may also detect the desire for doctrinal tidiness and the vague hope that by throwing a net of legal controls into the vastness of the universe one may tame the disturbing unknown. The diverse proposals for a "Big-Solution-Now" seem to proceed upon one or more of several underlying assumptions:

- (a) That paper agreements solve problems whether or not effective sanctions exist to assure compliance.
- (b) That the necessary objective of negotiation is agreement.
- (c) That almost any agreement is better than no agreement.
- (d) That over-all solutions that fail are superior to particular adjustments that succeed.
- (e) That international control, operation or ownership is somehow "demanded" by the supposed intrinsic supranationality of extraterrestrial activity or else morally superior to a "national" solution.
- (f) That the supposed tidiness of an explicit comprehensive treaty or convention would be so far preferable to the uncertainty of the legal situation in the absence of such a treaty that it is worth paying a substantial price to achieve it.

These assumptions are at least debatable, and in present circumstances some of them seem plainly wrong. At all events a broad agreement of this sort is unlikely under present conditions, and hopes should not be raised if they are very likely to prove false. Particular subjects may be dealt with by formal agreement; we suggest below some of the subjects on which agreement is foreseeable, if not probable. The remainder of what a future historian will—only in that future—be entitled to call "The Law of Space," when law is conceived as the community's expectation about the ways in which authority will and should be prescribed and applied, will undoubtedly grow by the slow building of expectations, the continued accretion of repeated instances of tolerated acts,³¹ the gradual development of assurance that certain things may be done under promise of reciprocity and that other things must not be done on pain of retaliation. The practice of the various makers of decisions, most of them in the foreign offices of nation states, will be guided by the experience of the past; it is in this way, and not by mechanical translation, that the two great bodies of legal experience with respect to air and the sea will become relevant.

Methods for the application of authority may also reasonably be expected to vary from those that have traditionally characterized the inter-

1955); Commission to Study the Organization of Peace, Strengthening the United Nations 218-219 (1957); Pépin, *The Legal Status of the Airspace in the Light of Progress in Aviation and Astronautics* 7 (1957); Danier and Saporta, "Les Satellites Artificiels," 18 *Rev. Gén. de l'Air* 297, 303 (1955); Peng, "Le vol à haute altitude et l'article 1 de la convention de Chicago, 1944," 12 *Rev. du Barreau de la Prov. de Québec* 277 (1952). *Contra*, Schachter, "The Law of Outer Space," address to International Law Association, American Branch, April 11, 1958 (mimeo.).

³¹ Until the diffusion of space technology, the number of states acting in outer space may be regarded as somewhat limited for establishing the expectations necessary to the growth of "customary law."

actions of states. Much of the concrete application of community prescription to the resolution of controversies about uses of outer space will of course be made, in centuries'-old tradition, by the states themselves against one another in supervising and regulating their own initiative enterprises. It is probable, however, that evolving space activities, with all their promise of new richness and intensified threats, will be attended by new and more comprehensive demands for direct, organized community intervention. Demands already being asserted range over such varying degrees of community involvement as: advance registration, advance inspection, approval prior to launching; regulation of launching-time, orbit, contents, and activities; prohibition of military uses; international operation of some or all space flight; and international ownership of some celestial spacecraft, as well as of space objects, things discovered, resources acquired, etcetera. In the presently unlikely event that one nation state acquires, and retains overwhelming power to prescribe and enforce order in space, the decisional process will be naturally weighted in favor of that state's policies, though the power be seldom exercised, as in the maritime *polari annica* of the nineteenth century.³²

V

Speculation on the outcome of controversies over the use of outer space must be muted by the awareness that no agreement in these circumstances will be worth more than the common interest of the participants, clarified either at the time of agreement or later in the course of experience under it. The fact that leaders purport to recognize such a common interest is of course, no proof that there is one, though there may indeed be one which they actors, despite their assurances, fail to recognize. The interdependence of the nations of the earth, already knit by contemporary technology, will be increased, at least until (and probably even after) the remote era of extraterritorial colonization has been followed by the still more remote period of the wars of interplanetary independence. This interdependence, though pervading all values, is most apparent in the field of security. There is no present reason to suppose that by reason of capabilities in outer space any state will become able absolutely to secure its military safety by unilateral action, while at the same time the danger of substantial military damage (not necessarily defeat) in the event of hostilities will if anything grow greater. Apprehension of possible military dangers, often exaggerated can be expected to continue to color decisions and to impede clarification of common interest in peaceful uses.³³

Most of the published legal discussion about probable future decisions, has been focused on the question whether existing prescriptions on sovereignty in airspace apply to flight in outer space. The principal text so

³² The policies of a dominant state need not favor claims of exclusive authority even by officials of that state; see McDougal and Burke, *loc. cit.* note 29 above, 566-769 (1958).

³³ McDougal and Feliciano, "International Coercion and World Public Order: The General Principles of the Law of War," 67 Yale Law J. 771 (1958).

jected to this type of analysis is the Chicago Convention on International Civil Aviation of 1944, which uses the term "aircraft" without defining it except in annexed wording close to the formula of the Paris Convention of 1919: "all machines which can derive support in the atmosphere from reactions of the air."³⁴ The flight of pilotless aircraft over the territory of non-consenting states is prohibited by Article 8 of the Chicago Convention, but this provision was taken in substance from Article 15 of the Paris Convention.³⁵

A few legal writers have taken the position that the Chicago Convention and domestic Constitutional or statutory pronouncements on sovereignty in airspace are automatically applicable to outer space.³⁶ The gist of their arguments is to the following effect: that the old texts referred to air, airspace, atmospheric space and aircraft only because there was no present occasion to describe specifically activities at higher altitudes, and that terms must therefore be interpreted as covering the entire range of flight; that the old texts should not be limited to whatever is now determined to be an appropriate "ceiling" for air or for atmosphere, because no one had a ceiling in mind when the existing prescriptions were formulated, and it was only by chance that terms were used which now turn out to have a ceiling; and that the first satellites in any event passed through atmospheric space for part of their orbits.

For those who have taken this position, the question of boundaries between airspace and outerspace is not so much a question of creating new authority to fill a void as it is of changing existing authority, already supposedly projected to the ends of the universe.

A rather larger number of writers have taken the position that the existing prescriptions on sovereignty in airspace cannot be applied to flight at altitudes where there is no air—or, as some take the trouble to put it, at altitudes where there is not enough air to sustain the flight of aircraft.³⁷

³⁴ International Convention Relating to the Regulation of Aerial Navigation (Oct. 13, 1919), Annex A, Preliminary Section; Convention on International Civil Aviation (Dec. 7, 1944), Annex H, Def. (a).

³⁵ International Convention Relating to the Regulation of Aerial Navigation (Oct. 13, 1919), Art. 15 (as modified 1929); see also 2 Proceedings of the International Civil Aviation Conference, Chicago, 1944, p. 1382 (1949).

³⁶ *E.g.*, Danier and Saporta, *loc. cit.* 297, 300; Sulzberger, "Air Space—A Need for Definition is Seen, But an Ancient Roman Maxim Goes Begging," N. Y. Times, Feb. 24, 1958; Peng, *loc. cit.* note 30 above, 292.

³⁷ *E.g.*, Pépin, *loc. cit.* note 30 above, p. 3; Cheng, "Recent Developments in Air Law," 9 Current Leg. Problems 208, 215 (1956); Ward, "Projecting the Law of the Sea into the Law of Space," JAG Journal, March, 1957, pp. 1, 5; Roy, "Some Current Considerations Affecting the Evolution of Space Law," Am. Rocket Soc. Pub. 388-57 (mimeo., 1957). Zadorozhnyi, *loc. cit.* note 28 above, states: "The Soviet artificial earth satellite does not violate the air sovereignty of any state if only because it does not fly in space over other states but the territory of these states by dint of the rotation of the earth passes as it were underneath the orbit of movement of the satellite, which orbit is constant in relation to the earth and stars." *Cf.* Haber, "Space Satellites, Tools of Earth Research," 109 National Geographic Magazine 486, 495 (1956): "Satellite Appears to Roam the Globe, Which Actually Rotates Beneath It . . . a satellite's orbit will remain undeviating though the spinning world changes its face from the Americas to Africa."

A few observers have supported the same position by other reasons which may be summarized as follows:

The old texts were prepared not for the purpose of controlling or dealing with flight in outer space but for the purpose of controlling and dealing with conventional flight, especially for the purpose of anticipated postwar civil aviation.

It is unwise to warp these texts to fit automatically a new and unforeseen situation, whether or not the old terms may be made verbally applicable.

Many technical facts bearing on space flight—such as velocity, altitude, velocity in relation to the rotation of the earth, methods of communication and guidance—as well as military and commercial possibilities, differ so widely from the corresponding facets of the problems dealt with in 1931 and 1944 as to preclude the old solutions from being automatically applicable.

Co-operation of some states and the acquiescence of others in the arrangements for the International Geophysical Year, which included plans of the United States and the Soviet Union to launch artificial satellites for scientific purposes, proved either that the consent of "underlying" states was unnecessary for flight in outer space or that such consent had been granted, at least as to activities of the kind contemplated within the IGY.³⁹

When writers in all these groups have turned from attempts to describe the results of previous decisions and begun to advance suggestions for a legal regime of space flight in the future, nearly all of them have sought for the purpose of allocating competence over exclusive and inclusive areas to divide outer space into fixed boundaries: boundaries fixed not by imaginary curtains vertically projected from national borders on the earth, but by equally imaginary horizontal sheets placed at stated altitudes parallel to the earth's surface. Everything under the sheet would be airspace, in which the rules of exclusive sovereignty would continue to prevail in national compartments confined by the border curtains; everything over the sheet would be "free" for all nations. The fascinating exercise of fixing the location of the sheet has been performed differently by different writers and this exercise continues even now. Some would place it as low as

³⁸ *Leg.*, Meyer, "Rechtliche Probleme des Weltraumflugs," 2 *Zeitschr. für Luftrecht* 31, 32-33 (1953); Jenks, "International Law and Activities in Space," 5 *Idaho Comp. Law Q.* 99, 103 (1956); Jacobini, "Problems of High Altitude or Space Jurisdiction," 6 *Western Pol. Q.* 680 (1953). Roy, *loc. cit.*, also mentions others of this order.

³⁹ An implied general consent to use of outer space for any and all purposes can scarcely be derived from express consent to uses connected with the IGY. Indeed, even express consent might perhaps be reasonably interpreted as limiting such competence, at least beyond uses of the same type and under similar auspices as the IGY uses.

thirty miles;⁴⁰ others, at fifty or fifty-three;⁴¹ others as high as two thousand. Some would fix the sheet with reference not to a stated number of miles but to a supposed physical constant like "the point where the earth's gravitational effect ceases,"⁴² which cannot mean what it seems to say; or the point where there ceases to be air or where there ceases to be enough air to sustain the flight of aircraft.

Some have suggested two sheets instead of one, to yield three zones instead of two. The most distinguished American authority on the law of flight, Professor John C. Cooper, arrived at this position in the course of a substantial evolution of ideas which the readers of his articles may trace. In July, 1951, Professor Cooper canvassed, though he disparaged, the possibility that a state's territory might extend to an altitude of 161,000 miles, which he reported as the point at which a rocket that had attained escape velocity "would leave the earth's area of attraction and pass into the gravitation control of the sun."⁴³ He considered that this point would be the extreme limit of state sovereignty under what he called the old classic legal theory, based on the right and duty of self-protection. The lower extreme of the range within which the boundary of state sovereignty might be fixed, Professor Cooper considered, was the upper limit of the "airspace," which he appeared to suggest was at an altitude of 60 miles. Within the range of 160,940 miles thus defined, he suggested that in the absence of international agreement the rule should perhaps be

that at any particular time the territory of each State extends upward into space as far as then scientific progress of any State in the international community permits such State to control space above it.⁴⁴

In April, 1956, Professor Cooper announced that he had abandoned this rule, convinced "of the existence of almost insuperable difficulties" in its application. He stated that an international agreement was necessary "to solve the questions as to the legal status of areas above those covered by a strict construction of Article I of the Chicago Convention," and that there might be an area of "territorial space" under the sovereignty of the subjacent state "up to the height where 'aircraft' as now defined, may be operated"; then a second zone, "contiguous space," which would extend from the top of "territorial space" to 300 miles above the earth, and would also be under national sovereignty but would be subject to "a right of

⁴⁰ Murphy, "Air Sovereignty Considerations in Terms of Outer Space," 19 Ala. Lawyer 11 (1958).

⁴¹ See N. Y. Times, Feb. 23, 1958; Cooper, "Missiles and Satellites: The Law and Our National Policy," 44 A. B. A. Journal 317, 320 (1958) (noting suggestions by Haley and others); Simpson, Space Law and the Practicing Attorney 9 (1958). For Hingorani, "An Attempt to Determine Sovereignty in Upper Space," 26 U. of Kansas City Law Rev. 5, 11-12 (1957), not even the sky is the limit. He would have all flight instrumentalities "subject to existing rules and regulations, no matter at what height they float."

⁴² Draper, "Satellites and Sovereignty," JAG Journal, Sept.-Oct. 1956, pp. 23-24.

⁴³ Cooper, "High Altitude Flight and National Sovereignty," 4 Int. Law Q. 411, 416 (1951).

⁴⁴ *Ibid.* at 418.

“perish . . . for all non-military flight instrumentalities when ascending or descending”; and finally, all space above contiguous space, which would be “free for the passage of all instrumentalities.”⁴⁵

Under the pressure of scientific events the suggestion has been still further confined. In September, 1957, in the light of new claims about the height reached by the Soviet ICBM, Professor Cooper warned that “obviously no neutral State can permit the space above to be used as an area for the passage of guided missiles designed to cause destruction in a distant State,” and that provisions would have to be made in international agreements “for national sovereignty upwards to include such parts of space as may be required so that neutrality is preserved in any event.”⁴⁶ This suggestion appears to have contemplated the extension of national sovereignty by agreement up to six hundred miles, which was the height that had been claimed for the Soviet ICBM.⁴⁷

Still later, a dilemma for the zonal theory was created by the announcement of the characteristics of an experimental American aircraft to be known as the X-15, in which manned flight would be possible for the same vehicle, to and fro, both in space that would have to be called airspace under any of Professor Cooper's definitions and in space that would be called something else. According to an address delivered on Washington's Birthday of this year, Professor Cooper would now simply register the fact that “rockets, high altitude guided missiles, satellites, and future spaceships are not aircraft . . .”; that “states have sovereignty in the air space above their surface territories and the right to control flight therein . . .”; and that

no agreement exists as to where the boundary is between the territorial airspace of a state and outer space beyond—nor as to the legal status of the intermediate area . . . in which . . . the presence of a certain amount of gaseous atmosphere may cause the fall of flight instrumentalities. . . .⁴⁸

One is led to wonder whether, if Professor Cooper's experience and ingenuity have proved unequal to the task of defining the boundaries of airspace and outer space in static zonal terms, the task is really possible or even worthy of accomplishment. Other efforts to arrive at boundary definitions as functions of altitudes, mass, velocity, heat resistance, and other physical variables combined, seem more technically sophisticated and might survive a little longer in the progress of scientific knowledge and engineering technology.⁴⁹ Yet such frontiers might prove to be vulnerable to just such versatile transitional devices as the X-15, and it may

⁴⁵ Cooper, “Legal Problems of Upper Space,” 1956 Proceedings, American Society of International Law 85, at 91.

⁴⁶ London Times, Sept. 2, 1957, p. 9.

⁴⁷ Cooper, “Flight-Space and the Satellites,” 7 Int. and Comp. Law Q. 82, 90 (1958).

⁴⁸ Cooper, “Missiles and Satellites: The Law and Our National Policy,” 41 A. B. A. Journal 317, 321 (1958).

⁴⁹ See, e.g., Haley, “Space Law—The Development of Jurisdictional Concepts,” Address to International Astronautical Federation, October, 1957 (mimeo., Am. Rocket Soc.).

be questioned whether they are as relevant for the purposes of human control and planning as would be an arrangement based upon types of spacecraft, probable functions, and potential dangers. Physical characteristics would of course enter into any judgment, but they could not be the only factors.

As the Chief of Staff of the United States Air Force has said,

In discussing air and space, it should be recognized that there is no division, *per se*, between the two. For all practical purposes air and space merge, forming a continuous and indivisible field of operation.⁵⁰

The General may have had more than one reason for putting it this way, but the truth of his statement is independent of the outcome of the controversy among the branches of the military service over control of United States defense activities in space.

In identifying the claims that will be made to the use of outer space we have suggested a distinction between sharable or inclusive uses and unsharable or exclusive uses of outer space, and have pointed out that claims to exclusive use of the airspace will probably continue to be made and defended under the label of sovereignty. Probably a general principle of "freedom of outer space" for inclusive, peaceful purposes will be fairly easily accepted and honored in authoritative decision; but for a time, at least, states will continue, for the better protection and control of activities on their land masses, to be indulged in their claims for exclusive uses of "airspace."

For distinguishing between these two competences—inclusive in outer space and exclusive in airspace—reference will undoubtedly also for a time continue to be made to some supposed boundary line, perhaps a line with a vague and shifting geographic reference as with the *x*-mile limit of territorial waters or the headland-to-headland lines of bays.⁵¹ Eventually, however, with growing awareness of the difficulties entailed by "fixed lines" or putative horizontal sheets and of the factors that do and should affect policy, the problem will transform itself from one of boundaries to one of activities, in an appropriate pattern of reciprocities and (potential) retaliations; and the now vexed question of the legal "status" of outer space will be discarded for practical purposes, as the question of "status" was discarded when negotiations on the use of airspace came to the point of concrete agreement.

It may be expected also that claims to occasional exclusive uses even in outer space will be honored if their frequency and importance are kept reasonably low. Certainly, in the absence of general agreement and community institutions to restrict inclusive uses to peaceful purposes, states will continue to assert, within the limits of their effective power, a unilateral competence to police or destroy space objects regarded as impermissibly

⁵⁰ White, "Air and Space are Indivisible," *Air Force Magazine*, March, 1958, p. 40 at 41.

⁵¹ McDougal and Burke, *loc. cit.* note 29 above, at 574-580.

affecting the security of their land masses.⁵² With respect to the oceans, assertion of such unilateral competence has been made and accepted for many purposes, including the protection of health, revenue, internal monopolies, and so on. Conceivably, a similar development in demand and reciprocal tolerance for a variety of purposes may occur with respect to outer space.

In any event, we should not expect to see a patchwork quilt of outer space like the patchwork quilt of contiguous maritime zones, because the pertinent distinctions will not be spatial distinctions. It will be relatively immaterial whether a man-launched object in outer space happens to be "above" the territory of the affected state at the moment when the offending activity is carried out, at the moment when orders for the offending activity are transmitted by electronic guidance from the earth or from some other station, or indeed at the moment when protective action is taken. For example, there can be some activities in outer space that, while they require line-of-sight connection with the relevant area on the earth, do not require that the particular line-of-sight remain within the projected vertical boundaries enclosing that area. Or, again, if something is dropped or pushed from outer space and falls on a given area on the earth, it is not a necessary incident that the spiral descent have commenced at a point "above" that area. Thus the counterpart in outer space of contiguous zones in maritime law is likely to be phrased, as indeed it is coming to be characterized in maritime law, in terms of type of activity and relevant intervals of time rather than in terms of location.

The resolution of other types of controversies over the use of outer space can be expected to draw upon past experience in the administration of activities regarded as comparable, appraising success and failure and projecting appropriate policy. Thus, control over the identification of space objects and the location of national responsibility for them as a preliminary to allocating the burdens and benefits of space activities may become a live problem if launchings become less highly publicized and so numerous as to outstrip the capacity of the tracking stations, if objects launched into space survive re-entry into the atmosphere and strike the earth or do other damage, if spacecraft on re-entry are retrieved by a state upon which another makes a claim as the owner or launcher, and if a spacecraft ever attains the ability to wrest economically valuable resources from another spacecraft. Here experience speaks in darkening voice. The problem of registration of vehicles financed by private entities has obviously not been solved in the law of the sea, where the necessity of a "genuine link" between the country of flag of registration and the nationality of private owners is

⁵² An activity in space might have some military value without affecting security to an impermissible degree. Among the factors to be considered are the character and importance of other values served by the activity, and the character and importance of the military threat. A telescopic satellite, for example, which might observe clouds, stars, or earth terrain, might well be deemed to present too small a threat, by comparison to its over-all utility, to justify any punitive action.

still warmly debated.⁵³ For rules of navigation, roughly adaptable models are available from the law of the sea and the law of airspace; similar principles, differing greatly in detailed application, may help in the co-ordination of launching times and flight plans, which will become important much sooner than navigation in the familiar sense.

Regulation and characterization of events on board spacecraft, a remoter problem, may similarly be analyzed and administered in ways familiar to those who have dealt with the analysis of events on ships and aircraft. The well-known competing principles of jurisdiction—nationality of the participants, territoriality (registration of the vehicle), protection of proximately affected nations (protective principle and principle of passive personality), as well as all the complementary principles in terms of “immunities” and “acts of state” by which jurisdiction is yielded—may all become relevant. These doctrines both permit any state substantially affected to assert its competence, when it has effective control over persons or assets, and afford sufficient alternatives in choice to encourage flexible accommodation in reciprocal demand and mutual tolerance.⁵⁴ The difficulty that states have had in regarding the pattern of practices developed with respect to events on board ship as transferable to the control of events on board aircraft⁵⁵ suggests that there may be difficulty in adopting either analogy directly for events on spacecraft. Detailed discussion of this may await the advent or more particular anticipation of concrete problems.

Despite the picturesque opportunities that the subject presents to imagination, it is probably equally premature to attempt to clarify in detail modes of redress for deprivation inflicted by space activities. The analysts of torts and delicts are already fairly skilled in weighing the interest in protection from injury against the need to foster initiative, the relevance of the fault of the various actors, the gravity of the harm that may occur, the probability of its occurrence, the cost of averting such occurrences and the efficacy of safety measures, and the rather more complex problems of the proper incidence of the various costs involved. Whether a rule of absolute liability would be preferable to some sort of fault liability; whether there is a place for public or private or mixed insurance schemes; whether an international fund might be set up to accommodate worthy claims; whether efforts should be made to reach international agreement on limits of liability—these questions may abide

⁵³ See Briggs (ed.), *The Law of Nations* 330-333 (2d ed., 1952); N. Y. Times, April 9, 1958, p. 66; Rienow, *The Test of the Nationality of a Merchant Vessel* (1937).

⁵⁴ Moursi, *Conflict in the Jurisdiction of Courts of Different States to Deal with Acts and Occurrences on Board Aircraft* (dissertation on file in Yale Law Library, 1955); Yntema, “The Historic Bases of Private International Law,” 2 *Am. J. Comp. Law* 247 (1953). Aircraft have presented a number of special difficulties with respect to problems of investigation, obtaining witnesses, providing for convenience of parties, and in determining the territorial location of events in controversy, with suggestions of possible allocations of authority to states of last departure and first landing. Events on board spacecraft may evoke or occasion similar difficulties in aggravated form, though the responses may be different.

⁵⁵ Cooper, *The Legal Status of Aircraft* 61 (mimeo., 1949); see 17 *Journal of Air Law and Commerce* 292 (1950).

our experience. The nearest relevant analogy may be the problem now beginning to be posed by the use of atomic reactor machinery and nuclear material.

Questions relating to occupation of territory in outer space and exclusive claims to new resources have again been much mooted. Among the respondents there appears some disposition to believe that particular doctrines, thought to express the state of the law of occupation on earth, will be automatically applied to extraterritorial exploration unless some agreement otherwise is reached;⁵⁶ but this apprehensive notion exalts the technical above the spirit. The details of any applied doctrine of occupation are always varied with relevant circumstances of technology, possibilities of effective occupation, difficulties of proof, and objectives of the particular parties. The policies behind the traditional doctrines on this subject derived from Roman law are, it may be recalled, to reward priority in time to a knowledge effectiveness of control, to maintain peaceful activity and public order, and to encourage the use of territory once explored or resources once developed. The history of application of the law of occupation and allocation of resources over the centuries, including the division of the continents of the New World and the inconclusive but instructive story of Antarctica,⁵⁷ gives no ground to suppose, for example, that the moon will become American or Soviet "property" if only the Stars and Stripes, or the Hammer and Sickle, are shot onto its surface.

VI

A durable agreement by explicit international convention on anything like a code of law for outer space is not, in our opinion, something now to be expected⁵⁸ or desired. One may indeed expect with rather more confidence a series of agreements, gradually arrived at, on particular subjects such as the continuation of the International Geophysical Year.

⁵⁶ The extreme illustration is provided in a popular article by Huss, "Let's Claim the Moon—Now!" *Mechanix Illustrated*, Feb.-March, 1957, pp. 70, 72: "Columbus took the Spanish Flag into the sands of a West Indies beach—and we of the Present could be perfectly within the concept of international law to claim possession of the Moon by shooting our national flag there by rocket."

⁵⁷ See Earl, "International Law—Claims to Sovereignty: Antarctica," 28 *So. Cal. Law Rev.* 346 (1955); Toma, "Soviet Attitude Towards the Acquisition of Territorial Sovereignty in the Antarctic," 50 *A.J.I.L.* 611 (1956). In May, 1958, the United States proposed to eleven other states a treaty for "freedom of scientific investigation throughout Antarctica," continuation of the international co-operation after the close of the IGY, and agreement "to insure that Antarctica be used for peaceful purposes only." *N. Y. Times*, May 4, 1958, Sec. 1, p. 19. Cf. Danier, "Les Voyages Interplanétaires et le Droit," 15 *Rev. Gén. de l'Air* 422, 425 (1952); Schachter, "Who Own the Universe?" *Colliers*, March 22, 1952, p. 36. The United States proposal on Antarctica may perhaps be considered a trial balloon (launched in a polar orbit) for outer space.

⁵⁸ States that have not been able to agree upon the width of territorial sea can hardly be expected fully to clarify a common interest in the allocation and regulation of uses of outer space. See *N. Y. Times*, April 26, 1958, p. 38: "No Sea Limit Set by 2 Month Talk."

the exchange of certain types of information, such as tracking data and some signaling codes, beyond present levels; the use or abstention from use of certain radio frequencies; and the co-ordination of launching schedules. Particular projects, like the establishment of television or radio relay satellites, might (in addition to whatever economic or scientific merits they possess) serve to test the possibilities of broad international co-operation more fruitfully than conferences on "the law of space." Agreement might be reached—not necessarily by the execution of formal documents—to abstain from the pollution of space by shrapnel or other "junk," which might otherwise be thrown up in an attempt to impede the flight of hostile satellites or hostile communications; such agreement would probably depend on the assurance either that other means of averting the danger from the hostile activities were adequate or that the activities did not present a danger sufficiently great to justify the pollution.

The modes of reaching such agreements cannot now be charted with any precision. Some agreements may be explicit and formal; some may be simply a consensus achieved by the gradual accretion of custom from repeated instances of mutual toleration. Some may be bilateral, others trilateral or multilateral; some may be within the framework of the United Nations, others within some other existing organization or some machinery yet to be set up. Their details and sequence must, like much else in an indeterminate universe, depend on the order of experience in space as well as on the changing political context.

We recognize, however, that the order of that experience will in turn be affected by expectations which decision-making officials in the nation states possessing space capabilities entertain as to the space plans of others, and by the reactions and attitudes of the earth community. In order to help allay anxieties about the possible weapons uses of space satellites and to help lay a foundation for closer co-operation in peaceful activities in space for common benefit—a co-operation from which an adequate and effective customary or conventional law might eventually emerge—the following suggestions might even now be considered by responsible officials:

(1) It was suggested in this JOURNAL early in 1957 that each state about to launch a satellite could register its intent to do so with an international agency, filing a flight plan and a description of certain characteristics of the satellite, such as load, weight, and size.⁵⁹ This could be combined with willingness to submit to international inspection, to assure that the payload conforms to the description filed. This suggestion could be put into practice by any state, regardless of the agreement of any other state; but the decision to do so might well be affected by the communicated willingness of other launching states to agree to corresponding measures.

(2) Agreement might be reached to abstain from the launching of satellites fitted with nuclear or other explosive warheads. Such an agreement probably would have to be contingent on the availability of effective

⁵⁹ McDougal, "Artificial Satellites: A Modest Proposal," 51 A.J.I.L. 74, 77 (1957).

satellite inspection of the type that is illustrated by the first case cited above. Whether it should or could be coupled with an agreement on the prohibition of the use of intercontinental ballistic missiles, and whether it should or could be considered as part of a possible general agreement on nuclear or universal disarmament, are matters of strategy, expediency and national, dependent upon the course of many variables.

States possessing the capability of launching satellites might launch certain types of satellites on behalf of, or even as trustee for, the United Nations. The launching state could retain responsibility for the launching operation, preserving control over the security of its territory. The United Nations would decide upon the purpose of the flight, determine the payload, design the instrumentation, and finance the construction of the satellite and its contents. The necessary United Nations decision could be made by an arm of the United Nations, or authority to make them could be delegated to the launching state or conceivably to some other agent. The existence of such "trust satellites" would not necessarily preclude national satellites with similar or identical functions.

KANSAS V. COLORADO REVISITED

BY ROBERT D. SCOTT

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Some time in 1907, Mr. Elihu Root, then Secretary of State, asked Mr. Chandler P. Anderson, his special counsel on Canadian matters, "how far, if at all, this Government is restrained by treaty provisions or by international law or by comity of nations from authorizing the diversion of waters from Birch Lake basin, as proposed by the Minnesota Canal and Power Company." The company had applied to the U. S. Government for a license to divert waters from the basin, and the Canadian Government had objected on the ground that Birch Lake, being tributary to an international river, could not be diverted without Canada's consent. In an opinion dated September, 1907, Mr. Anderson answered that the United States was not restrained by either the Webster-Ashburton Treaty or by international law. In discussing the international law of the case, Mr. Anderson quoted Mr. Justice Marshall's opinion in *Schooner Exchange v. M'Faddon* for the proposition that "the jurisdiction of the nation within its own territory is necessarily exclusive and absolute" and concluded:

. . . no voluntary restriction upon the use of these tributary waters within the borders of the United States can be admitted. The United States is fully committed to this proposition, not only as a matter of principle, but in actual practice and as a matter of policy.

Then, after citing a decision of the Supreme Court of Minnesota and a report of the Waterways Commission, Mr. Anderson wrote:

The recent case of *Kansas v. Colorado*, decided by the United States Supreme Court in June last, may also be cited as an authority on this proposition.¹

Mr. Anderson's "proposition" is, of course, the so-called Harmon doctrine. First announced by Attorney General Harmon in 1895,² the doctrine was frequently asserted by the United States in water controversies with Mexico and Canada between 1895 and 1911. More recently, however, the doctrine has been repeatedly criticized, and some writers have been so bold as to say that the doctrine is dead. For some time, and in important instances, the assault against the Harmon doctrine has been supported by citation of opinions of the Supreme Court which have been rendered in interstate water disputes. Most conspicuous among these cita-

* The opinions expressed in this article are solely those of the author and should in no regard be attributed to the Imperial Ethiopian Government.

¹ Chandler P. Anderson, Opinion dated September, 1907: In the Matter of the Application of the Minnesota Canal and Power Co. (State Department File No. 1718/27, National Archives).

² 21 Ops. Attys. Gen. 274.

tions, and the most frequently appearing, has been the case of *Kansas v. Colorado*. It is curious, therefore, to say the least, to realize that in 1907 contemporary legal scholars did *not* understand *Kansas v. Colorado* in the way urged by present-day critics of the Harmon doctrine.³

In this essay it is proposed to revisit the 1907 decision, to trace its subsequent history and to reappraise its meaning and value in the light of Mr. Anderson's apparent understanding that *Kansas v. Colorado* actually *upheld* the Harmon doctrine. In short, it is purposed to suggest that we are now being misled, although with sincere conviction, by those writers who argue that the Supreme Court, in working out the doctrine of equitable apportionment for application to *interstate* cases, has questioned the Harmon doctrine as a rule of international law applicable to disputes between sovereign independent nations. On the contrary, it will be shown that the *dicta* of the Supreme Court are to the opposite effect.

The 1907 opinion in *Kansas v. Colorado*⁴ was the last in a series of four opinions in which the Supreme Court first worked out a rule for decision in interstate water disputes. The series began January 28, 1901, when the Court overruled a demurrer in the case of *Missouri v. Illinois*.⁵ The first decision in *Kansas v. Colorado* came on April 7, 1902,⁶ also overruling a demurrer. The Court then heard evidence in both cases, and four years elapsed before the cases came on for argument. A final order denying an injunction was entered in *Missouri v. Illinois*⁷ on February 19, 1906; and *Kansas v. Colorado* was finally disposed of the same way on May 13, 1907.

The four opinions must be studied together, but the pivotal opinion is that of the second *Missouri v. Illinois*, delivered for the Court by Mr. Justice Holmes who, having been appointed December 4, 1902, and sworn December 8, 1902, had taken no part in the first *Missouri v. Illinois* or the first *Kansas v. Colorado*. It is no exaggeration to say that Justice Holmes had a decisive influence in the disposition of these cases. After the second *Missouri v. Illinois*, there was less difficulty about the proper source of law for cases involving interstate water disputes. What emerged was the Court's view that it was precisely because international law could *not* apply interstate that the Supreme Court was granted jurisdiction of cases involving disputes between states and found itself under the necessity of working out rules which had never before existed. The Court called its new rules "interstate common law," i.e., a law peculiar to the United States under the American Constitution.

For clarity, it is necessary again to brief the opinions.

³ A contemporaneous note on the case appeared in 21 Harvard Law Rev. 132 (1907). Under the title, "What Rule of Decision Should Control in Interstate Controversies?" the note discussed *Kansas v. Colorado*, 206 U. S. 46 (1907) and *Georgia v. Tennessee Copper Co.*, 206 U. S. 230 (1907), noticing particularly the Court's reference to "interstate common law." There is no suggestion that international law furnished the rule for decision. See also 1 A.J.I.L. 215, 730 (1907).

⁴ 206 U. S. 46 (1907).

⁵ 180 U. S. 208 (1901).

⁶ 185 U. S. 125 (1902).

⁷ 200 U. S. 496 (1906).

In January of 1900 Missouri filed a bill of complaint against Illinois and the Sanitary District of Chicago alleging that Chicago's discharge of sewage into the Mississippi River constituted a threat to the health and comfort of the large communities situated on the river. Missouri prayed that such discharge be enjoined as a nuisance. The Court inquired whether the allegations disclosed a controversy between the two States within the meaning of the Constitutional provision which creates and defines the original jurisdiction of the Supreme Court:

The judicial power of the United States shall be vested in one Supreme Court. . . . The judicial power shall extend . . . to controversies between two or more States. . . . In all cases . . . in which a State shall be a party, the Supreme Court shall have original jurisdiction.⁸

This was not a case of first impression, for the Court had applied the same Constitutional provision years before in the case of *Rhode Island v. Massachusetts*,⁹ a dispute over boundaries. But Illinois had challenged the essential jurisdictional fact: Was this controversy really between States? The Court found it necessary to construe the Constitution again to show that it applied to a case in which the State appeared as *parens patriae* as well as one in which the State was involved as a proprietor.

After a lengthy review of the origin of the Constitutional provisions, the Court observed through Mr. Justice Shiras that

. . . it must surely be conceded that, if the health and comfort of the inhabitants of a State are threatened, the State is the proper party to represent and defend them.¹⁰

Then came the first *dictum* to the effect that such disputes between sovereign and independent nations are wholly political:

If Missouri were an independent and sovereign state all must admit that she could seek a remedy by negotiation, and, that failing, by force. Diplomatic powers and the right to make war having been surrendered to the general government, it was to be expected that upon the latter would be devolved the duty of providing a remedy

⁸ Constitution, Art. III.

⁹ In *Rhode Island v. Massachusetts*, 12 Pet. 657 (1838), Judge Baldwin made an extensive survey of the English origins of the Court's jurisdiction to hear and determine disputes between States and of Congress' power to approve compacts between them. Controversies between counts palatine and other proprietaries (such as the colonies) were once subject to the King in Council, if the controversy did not arise out of agreement, and to Chancery if it did. The American Constitution reversed the practice, making agreements (compacts) subject to the political power (Congress) and controversies not founded on agreement subject to the judicial power. But neither Chancery nor the King could ever hear a complaint against a true sovereign, a purely political matter. The majority held that the usages of nations were applicable to boundary disputes between States, but Chief Justice Taney dissented, saying that in his opinion the Court had no jurisdiction to hear disputes over sovereignty. He cited Chief Justice Marshall's opinion in the *Cherokee Nation v. Georgia* in support of his dissent. No doubt this disagreement in the Court is traceable to the old dispute of States' rights *v.* Federal power, *almost* a dead issue today, but entirely a Constitutional rather than an international one.

¹⁰ 180 U. S. 208, 241 (1901).

and that remedy, we think, is found in the constitutional provisions we are considering.¹¹

A dissenting minority of three Justices (Harlan, White and Fuller) thought that in this case Missouri and Illinois were not in direct antagonism as States, and so would have sustained the demurrer. But they, too, agreed that such remedy as the Constitution provided was available only because the States were no longer sovereign and independent. Chief Justice Fuller stated their position:

Controversies between the States of this Union are made justiciable by the Constitution because other modes of determining them have surrendered; and before that jurisdiction, which is intended to supply the place of the means usually resorted to by independent sovereignties to terminate their differences, can be invoked, it must appear that the States are in direct antagonism as States.¹²

The majority, having found facts for original jurisdiction, decided that the bill stated a basis for injunction and overruled the demurrer. Significantly, the Court and counsel appeared to have assumed without argument that Illinois was subject to the usual rules of equity as they apply to continuing nuisance. Counsel for Illinois argued that his State was not a proper party, but he did not suggest that, as a sovereign State, Illinois should not be held to the same standard as a private citizen. No absolute sovereignty theory was advanced in support of the demurrer.

From hindsight, Mr. Justice Shiras' opinion is unsatisfying for the reason that it failed to notice the most important question, *viz.*, to what law is a State of the United States subject if no standards are provided in the Constitution? The Chief Justice would ask the question in the first *Kansas v. Colorado*; Mr. Justice Holmes would analyze it in the second *Missouri v. Illinois*; and Mr. Justice Brewer would supply the definitive answer in the second *Kansas v. Colorado*.

In the first *Kansas v. Colorado*¹³ the Harmon doctrine was raised but once and rejected as a rule for application between States of the United States. Here, for the first time the Court mentioned international law mentioning it, however, in a way merely to bridge, with the fullness of the Court's powers, the span between Kansas' appeal to the common law and Colorado's appeal to the Harmon doctrine.

This is the first, also, of Colorado's frequent appearances in court in water disputes. Colorado is the classic upstream State. In 1902 she was "undeveloped" as compared to some of her downstream neighbors. In order to use the streams which rise within her boundaries and flow in all directions she was obliged to litigate for her rights against those States which would cite prior appropriation as a basis for superior right. It is instructive to note that in her numerous water disputes Colorado has been only once successful in all but one case, *viz.*, *Wyoming v. Colorado*.

¹¹ *Id.*

¹² *Ibid.* at 249.

¹³ 185 U. S. 125 (1902).

¹⁴ 279 U. S. 419 (1929); defined, *Colorado v. Kansas*, 320 U. S. 383, 392, note 2 (1943).

and even that case has not gone without subsequent question in the evolution of the equitable apportionment doctrine.

The Arkansas River rises in southern Colorado and flows eastward into Kansas. Late in the 19th century, settlers in southeast Colorado made diversions of the river for the purpose of irrigating an arid portion of the State. Kansas objected to the diversions and finally sought an injunction in the Supreme Court. In her bill of complaint, Kansas alleged that diversions in Colorado were depriving Kansas and its inhabitants of the water accustomed to flow in the river, thus causing irreparable injury.¹⁵ As Illinois had done in the earlier case, Colorado demurred. But Colorado advanced a different and stronger argument. This argument was the Harmon doctrine: Colorado is exclusively sovereign over her territory and may use her own waters as she pleases.¹⁶

Kansas contended that, in diverting the river, Colorado was violating the "fundamental principle that one must use his own so as not to destroy the legal rights of another." As Missouri had done in the earlier case, Kansas invoked the common law, basing her claim of right on the rule that riparian owners are entitled to a continuous flow of the stream.¹⁷

The Court again discussed the jurisdictional question involved, *viz.*, Was this controversy between States and so subject to the Supreme Court's original jurisdiction? The opinion in *Missouri v. Illinois* was reviewed. Kansas was found to appear as representative and on behalf of her citizens; and the action complained of was found to be "State action and not the action of state officers in abuse or excess of their powers."¹⁸ Having thus laid a basis in fact to support the jurisdiction, the Court turned to the question whether the complaint of Kansas presented a justiciable cause of action. The Court had found that the facts alleged in *Missouri v. Illinois* had presented a cause of action "justiciable under the Constitution." But what of this new contention of Colorado's? The Chief Justice set it out in full:

The State of Colorado contends that, as a sovereign and independent State, she is justified, if her geographical situation and material welfare demand it in her judgment, in consuming for beneficial purposes all the waters within her boundaries; and that as the sources of the Arkansas River are in Colorado, she may absolutely and wholly deprive Kansas and her citizens of any use of or share in the waters of that river. She says that she occupies toward the State of Kansas the same position that foreign states occupy toward each other, although she admits that the Constitution does not contemplate that controversies between members of the United States may be settled by reprisal or force of arms, and that to secure the orderly adjustment of such differences, power was lodged in this court to hear and determine them. The rule of decision, however, it is contended, is the rule which controls foreign and independent States in their relations to each other; that by the law of Nations the primary and absolute right of a State is self-preservation; that the improvement of her revenues, arts, agriculture and commerce are incontrovertible rights

¹⁵ 185 U. S. 125, 137 (1902).

¹⁶ *Ibid.* at 138, 143.

¹⁷ *Ibid.* at 146.

¹⁸ *Ibid.* at 142.

or sovereignty; that she has dominion over all things within her territory, including all bodies of water, standing or running, within her boundary lines; that the moral obligations of a State to observe the demands of comity cannot be made the subject of controversy between States; and that only those controversies are justiciable in this court which, prior to the Union, would have been just cause for reprisal by the complaining State, and that, according to international law, reprisal can only be made when a positive wrong has been inflicted or rights *stricti juris* withheld.¹⁹

Immediately following this statement the Chief Justice distinguished the situation of a State "prior to the Union" and its situation under the Union:

But when one of *our States* [*i.e.*, non-sovereign and non-independent] complains of the infliction of such wrong [*i.e.*, a positive wrong or the deprivation of such rights [*i.e.*, rights *stricti juris*] by another State, how shall the existence of cause of complaint be ascertained, and be accommodated if well founded? The States of *this Union* cannot make war upon each other. [As they could prior to the Union]. They cannot "grant letters of marque and reprisal." [*i.e.*, remedies which, if available, would constitute a sanction behind an effort to negotiate]. They cannot make reprisal on each other by embargo. They cannot enter upon diplomatic relations and make treaties.²⁰

In other words, Colorado's contention *may* fit a sovereign independent nation but not "one of *our States*." The climate in which rules applicable to independent nations arise is totally different from that obtaining for States under the Constitution. The Court obviously implies that for this reason rules of international law, whatever they may be, cannot be applied willy-nilly between American States. Colorado had made an "as if" argument, contending that a rule of international law should be applied "as if" the States were independent sovereigns. The Court did not agree. But the Court, it must be noted, did not *disagree* that the substantive rule invoked by Colorado was proper for application between independent nations. The question was not before it; the Court merely noticed that the Constitution had changed matters between American States to the point that Colorado's argument did not apply. Its discussion in this regard related to the source of law, not to the validity of the rule invoked:

Comity demanded that navigable rivers should be free, and therefore the freedom of the Mississippi, the Rhine, the Scheldt, the Danube, the St. Lawrence, the Amazon, and other rivers has been at different times secured by *treaty*; but if a State of this Union deprives another State of its rights in a navigable stream and Congress has not regulated the subject, as no treaty can be made between them, how is the matter to be adjusted?²¹

Here the Court rested, for the time being. It made no choice of law in deciding that in any case the cause should "go to issue and proofs

¹⁹ *Ibid.* at 143.

²⁰ *Ibid.* Italics and material in brackets supplied.

²¹ *Ibid.* at 144. Italics supplied.

before final decision." The Court observed that Kansas had appealed to common law as the proper source of an applicable rule. Then, leaving every issue except jurisdictional facts undecided, the Court assured the litigants that, whatever the proper source of law was, the Court had plenary judicial powers to go to it; but it had to hear the proofs before it could decide where to go for a rule:

Sitting, as it were, as an international, as well as a domestic tribunal, we apply Federal law, State law, and international law, as the exigencies of the particular case may demand, and we are unwilling, in this case, to proceed on the mere technical admissions made by the demurrer.²²

It is this quotation which critics of the Harmon doctrine repeat in order to argue that the Court applied international law in the *Kansas v. Colorado* case and, while doing so, rejected the Harmon doctrine. Their argument, however, is too facile, as the foregoing analysis of the Court's operative words has shown. It may be added that the Court went a bit astray in saying it was an international tribunal. That phrase "as it were" we may suppose was intended as qualification, but the whole statement is a bit too broad. The Court certainly applies international law from case to case, but an international tribunal it is not—not even "as it were."

The demurrer was overruled, but no judgment was entered. Both parties were at liberty to renew their respective contentions after proof was in.

The first *Kansas v. Colorado* "decision" was no international law decision. Still, if we consider the *obiter dicta*, there is an implication running through the whole opinion that Colorado would have been right in her substantive contention if she had been an independent nation. This same implication will come very close to affirmative opinion in the next case to which the Court gave its attention, *viz.*, the second *Missouri v. Illinois*.

The second *Missouri v. Illinois* was argued January 2, 3, and 4, 1906, and decided February 19, 1906. Mr. Justice Holmes had been on the bench a little over three years when he delivered the opinion. He had replaced Mr. Justice Gray on December 8, 1902, and Mr. Justice Shiras, who delivered the opinion in the first *Missouri v. Illinois*, had been replaced by Mr. Justice Day; otherwise the Court was the same as that which ruled on the two earlier cases.

Where Justice Shiras' opinion had been "tonsorial and agglutinative," Justice Holmes' was "Holmesian." The brief opinion takes the usual giant strides; some sentences are loaded with portent; but it goes to the heart of the matter in a way to give it an authority greatly transcending the pale stuff of the two earlier cases. One paragraph of facts, a notice of Illinois' answer denying the allegations of the bill, and then:

The decision on demurrer discussed mainly the jurisdiction of the court, and, as leave to answer was given when the demurrer was over-

²² *Ibid.* at 146, 147. See editorial by Chandler P. Anderson on the 1906 case, in 1 A.J.I.L. 730 (1907).

ered naturally there was no precise consideration of the principles of law to be applied if the plaintiff should prove its case. . . .²³

Here is succinct warning that the Court will now consider substantive principles and that whatever may have been intimated on this subject in the first case is to be ignored—not even cited. And the same went for the next *Kansas v. Colorado*, for, except to hark back to the Chief Justice's answer to the question in that case, and to reiterate a rule of equity, *Kansas v. Colorado* is not cited.

The nuisance set forth in the bill was one which would be of international importance—a visible change of a great river from a pure stream into a polluted and poisoned ditch. The only question presented [on demurrer] was whether as between the States of the Union this court was competent to deal with a situation which, if it arose between independent sovereignties, might lead to war.²⁴

The Court then faced squarely the question of what was to be the source of law for the settlement of disputes between American States—"our States," as the Chief Justice had distinguished them. In the case of *Pennsylvania v. Wheeling and Belmont Bridge Co.*, said Justice Holmes:

There was a bill brought by a State to restrain a public nuisance, the erection of a bridge alleged to obstruct navigation, and a supplemental bill to abate it after it was erected. The question was put most explicitly by the dissenting judges but it was accepted by all as a national one. The Chief Justice observed that if the bridge was a nuisance it was an offence against the sovereignty whose laws had been violated, and he asked what sovereignty that was. 13 How. 581; Daniel, J., 13 How. 599. See also *Kansas v. Colorado*, 185 U. S. 125. It could not be Virginia, because that State had purported to authorize it by statute. The Chief Justice found no prohibition by the United States. 13 How. 580. No third source of law was suggested by any one. The majority accepted the Chief Justice's postulate, and found an answer in what Congress had done.²⁵

Congress had sanctioned a compact between Kentucky and Virginia, said the Justice, which had provided that the use and navigation of the Ohio River were to be free and common to the citizens of the United States. This was enough for the majority of the Court, and they held the case to be ruled by Federal statute. The dissenters could not accept this rationale.²⁶

²³ 200 U. S. 496, 517 (1906).

²⁴ *Ibid.* at 518.

²⁵ *Ibid.* In *Pennsylvania v. Wheeling and Belmont Bridge Co.*, 13 How. 518, 581 (1851), Chief Justice Taney, while dissenting, used these words: "The rule as to navigable waters is this: Every independent nation has the exclusive jurisdiction over the navigable waters lying within its territorial limits. . . . This was the situation of the old states prior to the adoption of the Constitution. Each was then an independent sovereign State. But by the Constitution of the United States they surrendered to the general government the power to regulate commerce . . . and thus, while they retain their absolute territorial jurisdiction over their navigable waters in all other respects, Congress may forbid . . ."

²⁶ *Ibid.* at 519.

But in *Missouri v. Illinois* there was no suggestion that Congress had forbidden Illinois' practice of dumping sewage into the Mississippi:

The only ground on which the State's conduct can be called in question is one which must be implied from the words of the Constitution. The Constitution extends the judicial power of the United States to controversies between a State and citizens of another State, and gives this Court original jurisdiction in cases in which a State shall be a party. Therefore, if one State raises a controversy with another, this Court *must* determine whether there is any principle of law and, if any, what, on which the plaintiff can recover. But the fact that this court *must* decide does not mean, of course, that it takes the place of a legislature. Some principles it must have power to declare. . . .²⁷

Here the Court rejected the municipal law as a source of decision for disputes between States:

. . . the words of the Constitution would be a narrow ground upon which to construct and apply to the relations between States the same system of municipal law in all its details which would be applied between individuals.²⁸

Evidently the Court had in mind the apparent assumption of the first *Missouri v. Illinois* that the private law of nuisance was applicable. Oral argument had been devoted almost entirely to the municipal law of nuisance.

Then came a recognition of the "peculiar" circumstance in which the Constitution placed the Supreme Court in interstate disputes:

If we suppose a case which did not fall within the power of Congress to regulate, the result of a declaration of rights by this Court would be the establishment of a rule which would be irrevocable by any power except that of this Court to reverse its own decision, an amendment of the Constitution, or possibly an agreement between the States sanctioned by the legislature of the United States.²⁹

To illustrate the difficulties in implying from the Constitution that municipal law rules may be applied interstate, the Court inquired how a definite time might be fixed for prescription. A prescription for a public nuisance may for good reasons be denied or granted as between a sovereign and the sovereign's own citizen; but these same reasons have no application as between an independent sovereign and a non-subject. How then to fix a period of prescription if prescription were to be granted in this case? A time was fixed by the courts in the rule against perpetuities but the "usual course," said the Court, "as in the instances of statutes of limitation, the duration of patents, the age of majority, etc., is to depend upon the law making power."³⁰

There are two points to be made out of this analysis. One is that there is no international law rule available which the Court might apply by analogy: The question between independent States is purely political. The other is that the Court is in any case reluctant to impose something of

²⁷ *Ibid.* Italics supplied.

²⁸ *Ibid.* at 520.

²⁹ *Ibid.*

³⁰ *Ibid.*

its own creation. The Court almost regrets its earlier finding of jurisdiction:

It is decided that a case such as is made by the bill may be a ground for relief. The purpose of the foregoing observations is not to lay a foundation for departing from that decision, but simply to illustrate the great and serious caution with which it is necessary to approach the question whether a case is proved. It may be imagined that a nuisance might be created by a State upon a navigable river like the Danube, which would amount to a *casus belli* for a State lower down, unless removed. If such a nuisance were created by a State upon the Mississippi the controversy would be resolved by the more peaceful means of a suit in this Court.³¹

In such a case, says Holmes, the Court has no choice; the Constitution requires a decision and the Court would have to decide. But the American States, although not independent, are at least more than individual citizens and

. . . it does not follow that every matter which would warrant a resort to equity by one citizen against another in the same jurisdiction equally would warrant an interference by this court with the action of a State. It hardly can be that we should be justified in declaring statutes ordaining such action void in every instance where the Circuit Court might intervene in a private suit, upon no other ground than analogy to some selected system of municipal law, and the fact that we have jurisdiction over controversies between States.³²

There is nothing in international law to help us, Holmes had said in effect, but neither will we be pushed into applying some misfit from the law governing two private litigants. Analogies there may be—and here Holmes put his individual stamp on all subsequent water dispute cases by citing his own 1884 opinion from the Supreme Court of Massachusetts in the case of *Manville Co. v. The City of Worcester*³³—but they are based on assumptions or reasoning which will not fit this sort of case between States. We must use restraint hereafter in accepting these squabbles between the States, he seems clearly to argue. Severely limiting the scope of the Constitutional provision, Holmes proceeds to lay down the rule which still governs the Court in its consideration of river disputes between the States:

Before this court ought to intervene the case should be of serious magnitude, clearly and fully proved, and the principle to be applied should be one which the Court is prepared deliberately to maintain against all considerations on the other side.³⁴

Missouri v. Illinois was the first case in which the complainant State was turned away with the decision that its case was not sufficiently proved. *Kansas v. Colorado* came hard after with the same decision. In a third *Kansas v. Colorado* case, in 1943,³⁵ Mr. Justice Roberts would apply the fore-

³¹ *Ibid.* at 520, 521.

³² *Ibid.* at 521.

³³ 138 Mass. 89 (1884), cited at 200 U. S. 496, 521.

³⁴ 200 U. S. 496, 521.

³⁵ 320 U. S. 383 (1943); 38 A.J.I.L. 485 (1944).

going rule with all its vigor. The Court would turn away case after case on the ground that the threatened injury was not serious or not sufficiently proved. In *Nebraska v. Wyoming*,³⁶ Mr. Justice Roberts would dissent vigorously on the ground that the majority had forgotten this cardinal principle—and Justice Douglas for the majority would protest continued devotion to the rule, showing the proof as presenting a case which the Court could not possibly avoid deciding.

Holmes found there was insufficient proof that Missouri was not in the position of a pot calling the skillet black. He had no principle to apply which the Court was prepared deliberately to maintain against all considerations on the other side. And the bill was dismissed without prejudice.

Ten months later the Court heard argument in the second *Kansas v. Colorado*,³⁷ the fourth proceedings of the series. The case was decided May 13, 1907, with Mr. Justice Brewer delivering the opinion. Where Holmes' opinion in the second *Missouri v. Illinois* had constituted the turning point in the drama Brewer's was *dénouement*. It is a broader, more confident opinion, as though the Court after its long consideration could now see clearly the Constitutional development which had become its lot to facilitate. The power of the Court, the position of the States and the Federal Government under the Federal system, the position of "the people," the source of law for interstate disputes, all are unfolded in an orderly, confident way.³⁸ Kansas' prayer for an injunction was denied, and, from the standpoint of results, Colorado had maintained her diversions as though she were exclusively sovereign; but the Court answered Holmes' question from *Missouri v. Illinois*, specifying a source of law for interstate disputes.

The second *Kansas v. Colorado* proceedings differed from the earlier proceedings in that, in addition to the two contending States, the Court also had before it the Federal Government. Solicitor General Hoyt and Assistant Attorney General Campbell argued the cause for the United States after having filed a petition of intervention in 1904. This appearance by the United States in a dispute between two States makes *Kansas v. Colorado* an outstanding illustration of why no rule made or applied in that case can be regarded as a rule of international law. For this is a case in which the Court had the Federal system under the microscope; far from considering the international law publicists, the Court was dominated in its thought by the purely domestic problem of what the empiricism of the

³⁶ 325 U. S. 589 (1945).

³⁷ 206 U. S. 46 (1907).

³⁸ Mr. Justice Holmes, it appears, may not have been so confident. Writing to Sir Frederick Pollock on Jan. 5, 1907, he was still troubled about the question he had raised in *Missouri v. Illinois*. "But one that one hardly can help worrying [*sic*] over . . . is a fight in our court between Kansas and Colorado over the Arkansas River. Colorado depends on irrigation, Kansas says it is drying up the river. The question concerns about $\frac{1}{2}$ of the United States. I think I sent you a case I wrote last term in which Missouri tried to stop the drainage of Chicago, in which I gave a light touch to fundamentals." 1 Holmes-Pollock Letters 136 (Howe ed., 1941).

Constitution had established as limits of power between the States and the Federal Government.

There is a "gap and vacancy in sovereignty somewhere," argued the Solicitor General, if the States are restricted to their own territory and if there is no sovereignty in the nation to regulate "where powers of two or more States overlap, and so clash, and injure each other and the aggregate interests." On the theory that such a gap in sovereignty could not have been intended by the drafters of the Constitution, the Solicitor General asserted an implied Constitutional power in the Congress to regulate the use of the river.³⁹

Against this contention, Colorado and the private defendants again asserted the Harmon doctrine, the Attorney General's opinion being specifically cited.⁴⁰ The Solicitor General denied that Colorado was in a position to assert such a doctrine:

The very fact that the controversy is justiciable here is proof that Colorado cannot do as she sees fit without accountability. She is a sovereign State of this Union, but not a sovereign nation. There is a higher sovereignty. All the States have transferred the decision of their controversies to this Court.⁴¹

Mr. Justice Brewer again considered the question of jurisdiction, but there is no need to review that discussion. Important to the thesis of this essay is his statement of the problems raised by Kansas' petition for injunction and the Government's petition of intervention:

Colorado denies that it is in any substantial manner diminishing the flow of the Arkansas river into Kansas. If that be true then it is in no way infringing upon the rights of Kansas. If it is diminishing that flow has it an absolute right to determine for itself the extent to which it will diminish it, even to the entire appropriation of the water? And if it has not that absolute right is that amount of appropriation that it is now making such an infringement upon the rights of Kansas as to call for judicial interference? Is the question one solely between the States or is the matter subject to national legislative regulation, and, in the latter, to what extent has that regulation been carried?⁴²

In other words, a rule governing the use of interstate rivers must be made while considering the Constitutional relation between non-independent States and the superior sovereign. No international practice was ever established in such circumstances.

Not were Justice Brewer's questions rhetorical only, to be ignored in reading the opinion or in applying it fifty years later. The opinion is built exclusively around these questions; the Court considered nothing else. No Grotius, no Vattel, no Klüber, no Bluntschli, not even the international law publicists cited by counsel, were discussed by the Court. With a judicial restraint which can be explained only by a conflicting view of the case, Mr. Justice Brewer and his brothers passed up the opportunity, presented them by counsel, to write their gloss on Grotius. The following

³⁹ 51 L. Ed. 966, 206 U. S. 46, 89.

⁴⁰ 51 L. Ed. 965.

⁴¹ 51 L. Ed. 964, 965.

⁴² 206 U. S. 46, 85 (1907).

quotation, dear to the critics of the Harmon doctrine, is in fact short shrift to the arguments of Colorado and her constituents:

. . . As Congress cannot make compacts between the States, as it cannot, in respect to certain matters, by legislation compel their separate action, disputes between them must be settled either by force or else by appeal to tribunals empowered to determine the right and wrong thereof. Force under our system of Government is eliminated. The clear language of the Constitution vests in this Court the power to settle those disputes. We have exercised that power in a variety of instances, determining in the several instances the justice of the dispute. Nor is our jurisdiction ousted, *even if*, because Kansas and Colorado are States sovereign and independent in local matters, the relations between them depend in any respect upon principles of international law. International law is no alien in this tribunal. In *The Paquete Habana*, 175 U. S. 677, 700, Mr. Justice Gray declared:

"International law is a part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."

And in delivering the opinion on a demurrer in this case Chief Justice Fuller said (185 U. S. 146):

"Sitting, as it were, as an international, as well as a domestic tribunal, we apply Federal law, State law, and international law, as the exigencies of the particular case may demand." ⁴³

The careful reader will notice the care with which the two qualifying words, "*even if*," are set off with commas. Colorado's argument against the Court's jurisdiction is disposed of without importing international law as the source of law from which an applicable principle is to be found.

Without pause or interlude the Court proceeds to declare the true source of law:

One cardinal rule, underlying all the relations of the States to each other, is that of equality of right. Each State stands on the same level with all the rest. It can impose its own legislation on no one of the others, and is bound to yield its own views to none. Yet, whenever, as in the case of *Missouri v. Illinois*, 180 U. S. 208, the action of one State reaches through the agency of natural laws into the territory of another State, the question of the extent and the limitations of the rights of the two States becomes a matter of justiciable dispute between them and this court is called upon to settle that dispute in such a way as will recognize the equal rights of both and at the same time establish justice between them. In other words, through these successive disputes and decisions, this court is practically building up what may not improperly be called *interstate common law*. This very case presents a significant illustration. . . . Surely here is a dispute of a justiciable nature which must and ought to be tried and determined. *If the two States were absolutely independent nations it would be settled by treaty or force.* Neither of these ways being practicable, it must be settled by decision of this court.⁴⁴

What is this interstate common law? Long after *Kansas v. Colorado*, the Supreme Court decided unequivocally that "There is no federal gen-

⁴³ *Ibid.* at 97. Italics supplied.

⁴⁴ *Ibid.* at 97, 98. Italics supplied.

oral common law.”⁴⁵ Was Justice Brewer’s concept rejected thereby? Not so. The same day the Court decided that there is no Federal general common law, it also said that whether disputed water must be apportioned between States “is a question of ‘federal common law.’”⁴⁶ The distinction noticed by Justice Brewer from *Western U. Teleg. Co. v. Call Pub. Co.*, still holds:

There is no body of Federal common law separate and distinct from the common law existing in the several states in the sense that there is a body of statute law enacted by Congress separate and distinct from the body of statute law enacted by the several states. But it is an entirely different thing to hold that there is no common law in force generally throughout the United States.⁴⁷

Holmes had said that “some principles it [the Court] must have power to declare.” He showed reluctance to declare new principles, fearing he would take the place of a legislature. In *Missouri v. Illinois*, Holmes had escaped the necessity of declaring more than the principal that disputes between States would not move the Court to “interfere” unless the injury was of serious magnitude, clearly proved, and the principle to be applied was one which the Court was deliberately prepared to maintain against all considerations on the other side. And here was the Federal Government, citing a “gap of sovereignty,” now come to Court to claim the power on behalf of its legislature to declare the principles applicable to interstate river disputes.

Mr. Justice Brewer put the microscope on the Federal system. Unlike the Federal judiciary, whose judicial power is plenary except as limited by the Constitution, the Federal Congress’ legislative powers are *enumerated* by the Constitution. Admitting Chief Justice Marshall’s doctrine of implied power, still a period must be put somewhere to its application. The Tenth Amendment to the Constitution shows that the Constitution did not contemplate a complete distribution of powers as between States and Federal Government, but reserved ungranted powers to the States or to the people. Each State has the reserved full jurisdiction over the lands within its borders, including the beds of streams; it may determine its own rules of law, following either the riparian rights or the prior appropriation theory. The doctrine of equality of right eliminates any power on the part of either Colorado or Kansas to impose a rule on the other. But it does not follow that because Congress cannot declare a rule between two States or because neither State can enforce its own policy upon the other, the controversy ceases to be of a justiciable nature or that there is no power which can take cognizance of the controversy and determine the relative rights of the two States. This dispute having been made justiciable

⁴⁵ *Eric Railroad Co. v. Tompkins*, 304 U. S. 64, 78 (1938).

⁴⁶ *Hindelider v. La Plata River & Cherry Creek Ditch Co.*, 304 U. S. 92, 110 (1938), citing *Kansas v. Colorado*, 206 U. S. 46 (1907); *Connecticut v. Massachusetts*, 282 U. S. 660 (1931); *New Jersey v. New York*, 283 U. S. 336 (1931) and *Washington v. Oregon*, 297 U. S. 517 (1936).

⁴⁷ 181 U. S. 92, 101 (1901); quoted at 206 U. S. 46, 96.

by the entry of the States into a Union, under Article III of the Constitution the Supreme Court with its plenary judicial power will declare the applicable law as a court declares the common law between individuals. The source is "interstate common law," and the process of finding the applicable principle from this source is the same as that by which a common law court finds the applicable common law rule. Since the common law "... after all . . . is but the accumulated expressions of the various judicial tribunals in their efforts to ascertain what is right and just between individuals in respect to private disputes . . .," there is no reason, *when the Court finds circumstances which require it to interfere*, why the Court, in the fullness of its Constitutional powers, should not declare principles of interstate common law.⁴⁸

Thus Justice Brewer traces out the empiricism of the Constitution, accepting the Solicitor General's argument that a new law of waters must be inaugurated, but rejecting his claim of legislative power in Congress. Thus also he rejects Colorado's claim to be judged according to a *political* standard, as though independent and completely sovereign.

And what are the substantive principles to govern this case? They come from equitable, not legal considerations. If this were a dispute between private claimants, the Court might in a proper case inquire merely whether *any* diminution in the flow had been caused by the upstream owner. But this dispute is between States, and the prosperity of the area bordering the river in Kansas will affect the general welfare of a community, the whole State. The Court, says the Justice, is "justified in looking at the question not narrowly and solely as to the amount of the flow in the channel of the Arkansas River, inquiring merely whether any portion thereof is appropriated by Colorado, but we may properly consider what, in case a portion of that flow is appropriated by Colorado, are the effects of such appropriation upon Kansas territory." In short, the Court, while adjusting the dispute on the basis of equality of rights, may balance the hardships in accordance with a well-recognized principle of equity.⁴⁹

Apparently not satisfied with the strength of his opinion up to this point, Justice Brewer introduced a second idea which detracts from an otherwise faultless argument. After reviewing the domestic law of waters in Kansas, the Justice remarks that since Kansas recognizes a right to use the water of a flowing stream for irrigation, subject to an equitable division between riparian owners, she is in no position to complain if the same rule is applied between her and Colorado.⁵⁰ What doctrine is this? Kansas, says the Justice, "cannot complain." Is there some kind of estoppel theory in this? It would seem impossible to make it stick: Kansas' irrigation practices on the Arkansas might cause harm to Oklahoma but not to Colorado. If it should appear that Oklahoma is humid enough in the area of the river to eliminate any dependence on its flow, then Kansas' diversions would harm no one. Justice Holmes had suggested in *Missouri v. Illinois* that, since Missouri also discharged sewage into the Mississippi,

⁴⁸ *Kansas v. Colorado*, 206 U. S. 46, 96, 97 (1907).

⁴⁹ *Ibid.* at 100.

⁵⁰ *Ibid.* at 104.

she could have the burden of proving that the contamination of which she complained was caused by Illinois and not by Missouri herself;⁵¹ but he did not suppose that the mere fact that Missouri followed a practice similar to that of Illinois would prevent her from having relief if she met the burden of proof. Justice Brewer made too much of the point so much so indeed that the idea furnished a precedent, albeit a very weak one, for granting a decree in the subsequent case of *Wyoming v. Colorado*,⁵² which came more later.

Plunging into the evidence, the Court found as facts that the Colorado diversions *had* diminished the flow of the river; that Kansas *had* suffered some detriment; that this detriment was not serious and the diversions for irrigation were the chief source of Colorado's rapid development. *Therefore*,

... when we compare the amount of this detriment with the great benefit which has obviously resulted to the counties in Colorado, it would seem that equality of right and equity between the two States forbids any interference with the present withdrawal in Colorado for purposes of irrigation.⁵²

Kansas was turned away, as Missouri had been, but with this difference: Missouri had not satisfied Holmes' rule that the actual or threatened damage must be clearly proved; Kansas, on the other hand, had met the burden of proof of damage—had got beyond Holmes' rule—but the application of a rule from "interstate common law" (*i.e.*, the balance of hardships) had gone against her. The result was of course the same: The upstream State continued the conduct of which the downstream State had complained. And Kansas' invocation of the common law rule of *sic utere* *quo* *pro* *ut* *alteri* *non* *laedatur* was ignored.

Here it is necessary to pause long enough to remember Mr. Chandler P. Anderson, who, as indicated above, gave the Secretary of State an opinion concerning a water dispute between the United States and Canada in September of 1907, just four months after *Kansas v. Colorado* was decided. Mr. Anderson's problem involved two sovereign and independent nations. In the circumstances in which Mr. Anderson was working, and considering that (1) Colorado had invoked the Harmon doctrine; (2) Harmon's opinion was twelve years old and had been written into the Treaty of 1906 with Mexico; (3) the Department of Justice had distinguished the position of Colorado from that of an independent nation; (4) the Supreme Court had agreed with the Department's distinction, is it any wonder that Mr. Anderson cited *Kansas v. Colorado* as authority for supporting the Harmon doctrine?

The point has now been made, perhaps *ad nauseam*, but a short reminder of how subsequent adjudications of the Court followed the same concepts will be useful.

*New York v. New Jersey*⁵³ was filed in 1908 and decided in 1921, fourteen years after *Kansas v. Colorado*. New York asked the Court

⁵¹ 206 U. S. 496, 522 (1906).

⁵² 206 U. S. 46, 117.

⁵³ 256 U. S. 296 (1921).

permanently to enjoin New Jersey from discharging sewage into New York Harbor. The petition was dismissed on the ground that the threatened invasion was not established as of a serious magnitude by clear and convincing evidence, citing the second *Missouri v. Illinois* opinion. For the first time the Court suggested that the dispute might better be settled by agreement than by litigation.

Then came *Wyoming v. Colorado*,⁵⁴ filed in 1911 and decided in 1922. Here Colorado found herself enjoined for the benefit of prior appropriators in Wyoming, downstream on the Laramie River. The case in the favorite of international lawyers who represent downstream nations. Downstream nations usually can prove a date of appropriation for beneficial use prior to that of the upstream nation. The terrain of the downstream nation is not so rugged as upstream; settlement and industry start down in the flatlands first; the river there is exploited long before the population and industrial development gradually move upstream. The appropriation theory has been useful as a rule of municipal law, but its willy-nilly application between nations and even between American States may condemn whole communities to limited development. Water supply is becoming a serious problem all over the world today. Communities that once could rely on a relatively abundant and seasonal rainfall are now forced by population growth to turn to river storage. Sometimes such a community finds that downstream development and the flatland lawyers have tried to foreclose the question on the basis of the prior appropriation doctrine.

Wyoming v. Colorado got off on such a dead-end road. The river involved was the Laramie. The Court decided that since both Colorado and Wyoming followed the appropriation theory in their domestic law, it would be equitable to apply the same theory interstate. Colorado was therefore enjoined from making diversions that might interfere with the prior appropriations in Wyoming. The Court harked back to Justice Brewer's suggestion that Kansas could not complain if its own domestic rule of law should be applied in a dispute between her and Colorado. Now the rule was applied against Colorado. Justice Brewer's concern for the *community interest* was forgotten. There was little discussion of balance of hardships; what there was seemed to give the advantage to Colorado. The Court could not see beyond the common law rule, falling into the danger of which Holmes had warned:

We are thus brought to the question of the basis on which the relative rights of these states in the waters of this interstate stream should be determined. Should the doctrine of appropriation, which each recognizes and enforces within her borders, be applied? Or is there another basis which is more consonant with right and equity?⁵⁵

The Court could think of no basis other than the appropriation doctrine. No other basis of any kind was suggested. Engineers testified that "within limits, financially and physically feasible, a fairly constant and dependable flow materially in excess of the lowest may generally be obtained by means of reservoirs adapted to conserving and equalizing the natural flow . . ."⁵⁶

⁵⁴ 259 U. S. 419 (1922).

⁵⁵ *Ibid.* at 467.

⁵⁶ *Ibid.* at 484.

But judicial thought was then incapable of keeping up with engineering thought. Violate the prior claims of private property-owners in Wyoming? Certainly not. "By what principle of right or equity may either State proceed in disregard of prior appropriations in the other?"⁵⁷ (Twenty years later, *Nebraska v. Wyoming* will answer by finding the equities between the public interest of two communities instead of between individual property-owners.) Require Wyoming to facilitate the financing of reservoirs which would allow Colorado to obtain a larger share of the water? Why should she?

The question here is not what one State should do for the other, but how each should exercise her relative rights in the waters of this interstate stream. Both are interested in the stream and both have great need for the water. Both subscribe to the doctrine of appropriation, and by that doctrine rights to water are measured by what is reasonably required and applied.⁵⁸

Colorado must give up her plans for Cache la Poudre for having started too late. Wyoming in due time, when she needs it, may dam her guaranteed flow of the Laramie.

Ideas of property were strict in those days. The rights of a community, a quasi-sovereign State, if you please, were ignored in the anxiety to protect private property-owners. The date, as has already been pointed out, was 1922.

In an anxiety to protect private property rights on the Laramie, the Court went too far with the language of its final decree—went beyond its Constitutional jurisdiction in fact. For instead of making a global apportionment to the two States, the Court enjoined the utilization of specifically recognized rights at particular points of diversion. This was patently an interference with the reserved power of the State of Colorado, within the limits of due process, to regulate property relations within her territorial boundaries.

The point was not long in coming back to the Court, but it came, curiously enough, in the guise of a complaint by Wyoming that Colorado was not abiding by the Court's decree. Private corporations and individuals not named in the Court's decree were making diversions in Colorado in places and quantities other than those named in the decree. Colorado demurred, saying the acts complained of were not hers but those of private corporations or individuals not parties to the present suit; she insisted that the Court construe its own decree. Wyoming alleged that the diversions made in Colorado exceeded the amounts specified for various locations by the decree.⁵⁹

The demurrer was overruled, evidence was taken again and the third proceedings were ended by a decision rendered in 1936, *i.e.*, twenty-five years after the suit was originally filed. The Court announced that the "departures from the decree which are charged against Colorado" included, *inter alia*, "diversions under claims not confirmed or recognized in the de-

⁵⁷ *Ibid.* at 468.

⁵⁸ *Ibid.* at 484.

⁵⁹ *Wyoming v. Colorado*, 286 U. S. 494 (1932).

cree.”⁶⁰ It seems incredible that the Court could draft and issue its decree with such a serious misconception of its function as arbiter between quasi-sovereigns. Yet that is obviously what happened. Justice Brewer had said that Congress could not legislate rules applicable to river disputes between States; he had also said that the Supreme Court had plenary powers to declare such principles judicially; but he would have been horrified, while he was construing the Constitution with such scholarly insight, if someone had suggested to him that, without prior adjudication by a State court and without invoking due process, he could go so far as to construe and apply a State’s domestic water law to “confirm” or “recognize” particular claims. Clearly, the Court, was not called on to do such a thing by Wyoming’s original bill. Mr. Justice Van Devanter apparently had been so impressed with the fact that both States followed the same domestic law that he forgot that he was speaking *only* for the Supreme Court and let himself wander off into the State’s preserve. He constituted himself a State tribunal, “as it were,” and applied State law when even his jurisdiction, much less the exigencies, did not require it. The Court was called on to apportion the river between the States; instead, it issued a decree which turned out to be a declaratory judgment of how the State was obliged to apportion the water.

True, the decree was merely an inadequate job of drafting. Obviously the Court should have added the existing senior diversions in Colorado and simply enjoined any diversions in excess of that amount except from unappropriated water, if any, leaving to the State the right to determine *who* would enjoy Colorado’s share of the water, in *what* amounts, and *where* the diversions could be made. The subsequent opinion laboriously recognized this fact. The Court started out:

We therefore must consider the contention made by Colorado that, consistently with the decree, she lawfully may permit diversions under any of the recognized appropriations in excess of its accredited quantity, so long as the total diversions under all do not exceed the aggregate of the quantities accredited to them severally.⁶¹

However, it clung to its view:

In both Colorado and Wyoming water rights acquired by appropriation are transferable, in whole or in part, either permanently or temporarily; and the use of the water may be changed from the irrigation of one tract to the irrigation of another, if the change does not injure other appropriators. [citations omitted] The rules in this regard are but incidental to the doctrine of appropriation. That doctrine prevails in both States and the decree in the earlier suit was based on it.⁶²

Blandly, without any modest denial of power so to interfere with the right of the State to dispose of property rights within its own boundaries, the Court stated:

It was not the purpose of that suit or of the decree to withdraw water claims dealt with therein from the operation of local laws relating to

⁶⁰ *Wyoming v. Colorado*, 298 U. S. 573, 578 (1936).

⁶¹ *Ibid.* at 583.

⁶² *Ibid.*

the transfer or to restrict their utilization in ways not affecting the rights of one State and her claimants as against the other State and her claimants.

We perceive no reason for thinking that it is in any wise material to Wyoming and her water claimants whether the water in question is diverted and conveyed to the place of use through the Skyline ditch, the Wilson Supply ditch or the ditches of the Laramie-Poudre Tunnel Project.⁶⁵

It is now clear so far as the total effect of the earlier decree was concerned. But the Court fell into precisely the same error again, in the subsequent opinion, with the following words:

For the reasons given in this opinion we conclude that the only relief to which Wyoming is now entitled is an injunction forbidding further diversions under the meadowland appropriations of more than 1,200 acre-feet per year measured at the headgates through which the water is diverted.⁶⁶

The total water apportioned to Colorado by the Court's decrees was 39,750 acre-feet per annum. Where is the Constitutional power of the Court to tell Colorado she cannot use the entire 39,750 acre feet on the meadowlands alone? Back came the case in 1940. This time it was Associate Chief Justice Hughes who clarified the decision quoted above.⁶⁷

But we are not finished with the Court's first attempts to confine a State within her own boundaries. In 1939 Colorado *had* exceeded the decreed portion of the waters of the Laramie. Wyoming asked that Colorado be adjudged in contempt. The result was ludicrous. Colorado defended by showing that Wyoming officials had acquiesced. Wyoming denied as much. The Court dodged the prospect of punishing a State for contempt by saying:

In the light of all the circumstances, we think it sufficiently apparent that there was a period of uncertainty and room for misunderstanding which may be considered in extenuation. In the future there shall be no ground for any possible misapprehension based upon views of the effect of the meadowlands diversions or otherwise with respect to the duty of Colorado to keep her total diversions from the Laramie River and its tributaries within the limit fixed by the decree.⁶⁸

Presumably, the States were to go in peace and stop appealing to the Court. Twenty-nine years had elapsed while the two States tried to uselaw instead of agreement.

Twenty-three years after the first *Wyoming v. Colorado* decision, in 1962, of what Mr. Justice Willis Van Devanter had said there was badly dated Mr. Justice Douglas, writing the opinion for the majority in *Nebraska v. Wyoming*,⁶⁹ a case in which Colorado had been impleaded by Wyoming, apportioned the North Platte River on the basis of the doctrine of equitable apportionment:

⁶⁵ *Ibid.* at 584.

⁶⁶ *Ibid.* at 586.

⁶⁷ *Wyoming v. Colorado*, 309 U. S. 572 (1940).

⁶⁸ *Ibid.* at 582.

⁶⁹ 325 U. S. 589 (1945).

We are satisfied that a reduction in present Colorado uses is not warranted . . . The established economy in Colorado's section of the river basin based on existing use of the water should be protected. Cf. *Kansas v. Colorado*, Supra, p. 394. Appropriators in Colorado junior to Pathfinder have made out-of-priority diversions of substantial amounts. Strict application of the priority rule might well result in placing a limitation on Colorado's present use for the benefit of Pathfinder [*i.e.*, the dam in Nebraska]. But as we have said, priority of appropriation, while the guiding principle for an apportionment, is not a hard and fast rule. Colorado's countervailing equities indicate it should not be strictly adhered to in this situation.

. . .⁶⁸

And what about those private property-owners who had been so sedulously protected in *Wyoming v. Colorado*?

We may assume that the rights of the appropriators *inter se* may not be adjudicated in their absence. But any allocation between Wyoming and Nebraska, if it is to be fair and just, must reflect the priorities of appropriators in the two States. Unless the priorities of the downstream canals senior to the four reservoirs and Casper Canal are determined, no allocation is possible. The determination of those priorities for the limited purposes of this interstate apportionment is accordingly justified. The equitable share of a State may be determined in this litigation with such limitations as the equity of the situation requires and irrespective of the indirect effect which that determination may have on individual rights within the State. *Hinderlider v. LaPlata Co.*, 304 U. S. 92, 106-108.⁶⁹

This is a far cry from the application of a private law theory as a rule of interstate common law in *Wyoming v. Colorado*.

The cases in between *Wyoming v. Colorado* and *Nebraska v. Wyoming* are not of particular importance. Except for *Connecticut v. Massachusetts* (1931),⁷⁰ none of them ever again mentioned international law. That was forgotten long before the modern rule of equitable apportionment emerged from *Nebraska v. Wyoming*.⁷¹ Even *Connecticut v. Massachusetts* reiterated reliance on "interstate common law" as the proper source for applicable principles.⁷² Most of the decisions since *Wyoming v. Colorado* have rejected the prayer for injunction by applying Holmes' rule that the injury complained of must be of "serious magnitude and established by

⁶⁸ *Ibid.* at 621.

⁶⁹ *Ibid.* at 627.

⁷⁰ 282 U. S. 660 (1931).

⁷¹ In *Arizona v. California*, 298 U. S. 558 (1936), the Court recorded without discussion that Arizona had asserted that the Court "may have recourse to applicable principles of international law and equity tending to secure to sovereign states equality of right in [interstate streams]." The petition to file a bill of complaint was denied because the United States, a necessary party, was not named as a defendant and had not consented to be sued. *Hinderlider v. La Plata R. & C. C. Ditch Co.*, 304 U. S. 92, 106 (1938), a case involving the application of a compact between Colorado and New Mexico, intimated that the States acted as independent sovereigns when they entered a compact approved by Congress, quoting *Poole v. Fleegeer*, 11 Pet. 185, 209 (1837), and *Rhode Island v. Massachusetts*, 12 Pet. 657, 725 (1838), but *quaere*, What independent sovereign ever had to obtain the approval of a higher sovereignty for its treaty?

⁷² 282 U. S. 660, 671 (1931).

clear and convincing evidence."⁷³ Those which have not gone off on this rule have returned to plague the Court again and again.⁷⁴ In the words of Mr. Justice Roberts, dissenting for himself, Mr. Justice Frankfurter and Mr. Justice Rutledge in *Nebraska v. Wyoming*:

Such controversies between States are not easily put to repose. Even when judicial enforcement of rights is required, the attempt finally to adjudicate them often proves abortive. Our reports afford evidence of this fact. Kansas and Colorado came here twice, at the instance of Kansas, in a dispute over the flow of the Arkansas River. In the case [*Wyoming v. Colorado*] presenting, on the whole, less difficulty than the present one, this Court entered a decree June 5, 1922, only to find it necessary to revise it on October 9, 1922. But the controversy would not down. The parties came back here on three occasions because of disagreements with respect to the effect of our decree. The controversy with respect to the diversion of the waters of Lake Michigan seemed to require a decree conditioned upon, and containing provisions with respect to, future conduct. The difficulty of administering that decree is evidenced by the repeated appearance of the parties in this Court.⁷⁵

And Mr. Justice Douglas, for the majority in the same case, repeating his devotion to Holmes' rule, agreed that a compact between the States was preferable to litigation, and protested that the Court was granting the decree only because the North Platte was already over-appropriated and the States had been unable to reach agreement.⁷⁶ The Court is apparently getting farther and farther along the way to relegating States to their power to make compacts with the consent of Congress. The "justiciability question" presented in river disputes is in fact too much for the Court; the solution by technology and finance fits easily into the settlement by compact—almost not at all into litigation.

There is no basis in the opinions of the U. S. Supreme Court for the assertion that the Court has rejected the Harmon doctrine as a rule of international law. Neither is there a basis for asserting that the Court has developed the doctrine of equitable apportionment as a rule of international law. For all the Court has said, a dispute over the use of international rivers between two sovereign and independent nations is still political, and the nations are in no way liable to each other for what is done to their rivers within their boundaries. Mr. Justice Marshall's opinion in *Schooner Exchange v. M'Faddon*,⁷⁷ cited to Secretary Root by Mr. Anderson in

⁷³ *North Dakota v. Minnesota*, 263 U. S. 365 (1923); *New York v. New Jersey*, 256 U. S. 293 (1921); *Connecticut v. Massachusetts*, 282 U. S. 660 (1931); *Washington v. Oregon*, 297 U. S. 517 (1936); *Colorado v. Kansas*, 320 U. S. 383 (1943).

⁷⁴ *Wisconsin v. Illinois*, 278 U. S. 367 (1929), further proceedings, 281 U. S. 179 (1930), 289 U. S. 395 (1933), 309 U. S. 569 (1940), 311 U. S. 107 (1940), 313 U. S. 547 (1941); *New Jersey v. New York*, 283 U. S. 336 (1931), further proceedings, 345 U. S. 369 (1953), 347 U. S. 995 (1954); *Nebraska v. Wyoming*, 295 U. S. 40 (1935), 347 U. S. 995 (1954); *Nebraska v. Wyoming*, 295 U. S. 40 (1935), further proceedings, 325 U. S. 589 (1945), 345 U. S. 981 (1953).

⁷⁵ *Nebraska v. Wyoming*, 325 U. S. 589, 664 (1945). Citation in brackets supplied.

⁷⁶ *Ibid.* at 608, 609.

⁷⁷ 5 C.anch 116 (1812).

1907, is the Court's last word on the nation's power within its own boundaries. *Obiter dicta* in the cases discussed above are strong in suggesting that the great Chief Justice's rule may be properly applied in international river disputes. This essay, however, makes no assertions as to the status of the Harmon doctrine in international law today.

A general conclusion to be drawn from the history of *interstate* water disputes might be that where a resort to rules of law is available, all possibility for agreement between the parties disappears once resort is had to those rules. One adjudication, inefficient as it may be in applying technological solutions, will block, apparently forever, any possibility for agreement. Until the States start litigating, there is always a chance that the more efficient solutions from technology may be made available through agreement. Once a State is certain about its rights, or part of them, these rights will stand in the way of easy agreement. One has only to compare the list of rivers regulated by compact with that of the rivers regulated by decree to see the truth of this conclusion.⁷⁸

Considering the inefficiency of an adjudication in interstate water matters, one may wonder whether the the Founding Fathers were so wise after all. The utilization of a river with efficiency and over a long period of time begs for empirical solution. Empirical solution implies either legislation or agreement. Legislation would seem to be the better means, for it eliminates, for the most part, the possibility of deadlock. *Nebraska v. Wyoming* is undoubtedly the best example of a judicial solution, but it must be admitted that even there the result could have been improved. The Court believed it should apportion only the *natural flow*. Better results could have been obtained by conditioning the apportionment on existing and financially and physically feasible storage facilities. The limitations inherent in an equity decree must make this method inefficient as compared with legislation and its handmaiden, expert administration.

Constitutionally, the American States are limited to litigation or compact: Compact is almost the rule now for those rivers which have never been litigated.⁷⁹ Nations are limited to treaties and should insist on remaining so. Self-interest, served by a technological solution based on the present and foreseeable needs of the respective nations of the basin, will induce agreement. Should independent nations ever be so poorly advised as to submit one of their rivers to litigation in a world court, they will have started down the tortuous road, from which there may be no return, marked out by *Kansas v. Colorado*, dead-ending in *Wyoming v. Colorado* and continuing, fairly but inefficiently, through *Nebraska v. Wyoming*. The better road is through compacts, technology, and self-interest.

⁷⁸ Twenty rivers have been regulated by compact since 1922. Eleven rivers have been the subject of litigation since 1900, of which only four have been regulated by decree. Only two of the remaining seven have become the subject of regulation by compact. The inability of the Lower Colorado Basin States to reach agreement is a striking example of how litigation can make agreement almost impossible. See Documents on the Use and Control of the Waters of Interstate and International Streams, U. S. Dept. of Interior (1956).

⁷⁹ *Ibid.* And see *Hinderlider v. La Plata R. & C. C. Ditch Co.*, 304 U. S. 92, 105 (1938).

THE COMMONWEALTH AND FAVORED-NATION USAGE

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Guidance of development in the British Commonwealth has involved the use of various legal means. In the field of international commercial relations perhaps none has been more striking than the adaptation of the familiar idea of most-favored-nation treatment. Once called a precious little clause,¹ the formula which has for its object to attain equality of treatment (rather than preferential status) has had a long history. At first glance it might appear to be but little suited to the purpose of easing the transition from Empire to a cluster of independent states. Yet there is no rule of treaty-making which precludes a modified use of the most-favored-nation idea, even if the idea is grounded generally in the principle of unconditionality.² The specific means may be variations in the wording of the formula itself or may be exceptions clauses. The latter would seem to be a more natural device (if, indeed, not the only feasible one) for the purpose in multilateral (as distinct from bilateral) arrangements.

The present study is limited principally to an examination of the "commercial" most-favored-nation clause, as distinct from treaty clauses on establishment and navigation matters. It does not undertake to follow the actual application of provisions through statutes or through national court decisions. The international legal, rather than the economic aspects, will be the subject of inquiry. Within these limitations, it is proposed to consider briefly (i) the manner of bringing into effect most-favored-nation commitments for distinct units of the British Empire and later Commonwealth; (ii) the use of the "most favoured *foreign* country" formula; (iii) the idea of what may be called "most favored Commonwealth country" treatment in relations of the Commonwealth states *inter se*; (iv) the development of imperial preferences; and (v) some conclusions which practice seems to suggest.

¹ M. T. Z. T'au, *The Legal Obligations Arising Out of Treaty Relations Between China and Other States* (Shanghai, 1917), p. 6 (cited after Herman Walker, Jr., "The Most-Favored-Nation Treatment of Consular Officers," an unpublished doctoral dissertation accepted at Duke University in 1937, at p. 2).

² On the meaning of unconditionality as American courts have interpreted it, see Horacio A. Catudal, "The Most-Favored-Nation Clause and the Courts," 35 *A.J.L.* 41-54 (1941).

I. ACCEPTANCE OF COMMITMENTS

The treaty-making process in the British Empire and the Commonwealth changed considerably as the members attained greater political autonomy. There came to be several ways by which a Commonwealth country might become a party to a most-favored-nation clause in a commercial treaty or agreement. Initially the colonies took no independent action in foreign relations and Great Britain was free to extend her commercial treaties at will to the entire Empire or any portion thereof. However, the interests of the mother country with an advanced industrial economy favoring free trade and those of the colonies striving to develop their economies did not always coincide.³ By the latter part of the nineteenth century these conflicting interests became increasingly evident and motivated a series of adjustments in treaty-making procedure to provide for the peculiar interests of the colonies.

The stimulus for granting a greater degree of freedom to the colonies in the matter of commercial treaties arose in the main from a problem over the application of most-favored-nation treatment. In the mid-nineteenth century Great Britain permitted certain of her colonies a greater degree of independence in tariff matters.⁴ However, shortly thereafter Great Britain negotiated treaties compelling the colonies to grant most-favored-nation treatment to foreign goods. Great Britain concluded commercial agreements in 1862 with Belgium⁵ and in 1865 with the Zollverein⁶ which applied automatically to the entire Empire. The signatories were granted unconditional most-favored-nation treatment in regard to any tariff preferences which might be extended by the colonies or the mother country *inter se*. The colonies, despite the colonial tariffs, were thus prevented from discriminating in favor of British products without bringing into effect the most-favored-nation clauses not only in the treaties with Belgium and the Zollverein, respectively, but also in those with other states that were parties to comparable commitments with Great Britain. In the late 1870's Canada expressed considerable objection to the two agreements and raised the issue of future representation in treaty-making. The Imperial Government agreed that in the future there would be no automatic extension of commercial treaties to include self-governing colonies.⁷

Despite the above-mentioned agreement, the self-governing colonies were

³ For an account of the long struggle on the part of the colonies to induce the mother country to replace its free trade policy by a system of imperial preferences, see United States Tariff Commission, *Colonial Tariff Policies* 630 ff. (1922).

⁴ See 9-10 Vict. c. 94; Baron Boris Nolde, "La Clause de la Nation la Plus Favorisée et les Tarifs préférentiels," 39 *Hague Academy Recueil des Cours* 101-102 (1932).

⁵ Great Britain, House of Commons, *Accounts and Papers*, 1863 [3071].

⁶ *Ibid.*, 1865 [3570].

⁷ Robert B. Stewart, *Treaty Relations of the British Commonwealth of Nations* 76-77, 96 (1939). It is to be noted that from 1870 onwards there was also an increased desire on the part of the colonies to develop a strong system of imperial preferences between themselves and the mother country. This was finally realized at the Ottawa Conference of 1932. See Nolde, *loc. cit.* 102-106.

included in the reach of the Treaty of Friendship, Commerce and Navigation of February 7, 1880, between Serbia and Great Britain. However, the Earl of Kimberley in a circular letter to the various Governors General, dated July 22, 1880, stated that the former Secretary of State for Foreign Affairs had acted "inadvertently" in the matter. The governments of the self-governing colonies were assured that in the future their desires would be ascertained before they were included in such commercial agreements.⁸ Subsequent to this time there was apparently no further automatic inclusion of the colonies.

The Treaty of Commerce and Navigation of 1880 with Rumania contained a protocol which stated that the instrument was not applicable to South Africa and that any British Colony, Possession or Protectorate could opt within six months after the exchange of ratifications to be excluded from the provisions of the treaty.⁹ However, the formula to be most used was that of the treaty of 1882 with Montenegro. This contained a clause which listed the colonies and foreign possessions to which the treaty was not applicable, but stated that the instrument could be applied to them if notice to that effect were given by Her Majesty's representative within one year after exchange of ratifications.¹⁰ By the early part of the twentieth century it was no longer customary to list specifically the units not affected. There was merely a stipulation that the agreement would not be applicable to the self-governing Colonies and Dominions unless notification were given by His Majesty's representative within one year after the exchange of ratifications.¹¹ Even after the self-governing Colonies and Dominions became independent nations of the Commonwealth with the power to negotiate their own commercial agreements, Great Britain continued to provide for their accession to commercial treaties negotiated by the mother country.¹²

The self-governing Colonies and Dominions were given not only greater leeway in acceding to complete commercial treaties (including, for example, establishment clauses), but also the advantage of most-favored-nation treatment of their products and goods on a reciprocal basis if they did not wish the entire treaty to be applicable to them. This was first accomplished in a treaty of October 31, 1905, between Great Britain and Rumania, Article XVII of which stated that the instrument was not applicable to British Colonies, Protectorates or Possessions unless notice of adhesion should be given, and continued:

Nevertheless, the goods produced or manufactured in any of His Britannic Majesty's Colonies, Possessions or Protectorates shall enjoy in Roumania complete and unconditional most-favoured-nation treatment, so long as such Colony, Possession or Protectorate shall accord

⁸ Canada, Sessional Papers (1883), Vol. XVI, No. 89, pp. 7-8.

⁹ Accounts and Papers, cited above, 1880 (C. 2615).

¹⁰ *Ibid.*, 1882 (C. 3231).

¹¹ See the Treaty of Commerce of April 19, 1905, between Great Britain and Nicaragua. *Ibid.*, 1906 (Cd. 3156).

¹² See, for example, the Treaty of Commerce and Navigation of Nov. 27, 1937, between Siam and the United Kingdom. 188 League of Nations Treaty Series 334.

to goods the produce or manufacture of Roumania treatment as favourable as it gives to the produce or manufacture of any other foreign country. . . .¹³

The net effect of this clause was to give the self-governing Colonies, Dominions and other Territories concerned the benefit of most-favored-nation treatment in regard to duties without the obligations contained in the treaty in regard to trade and establishment. Great Britain also continued to include such provisions in her commercial treaties after the independent Commonwealth countries were negotiating their own commercial agreements.¹⁴

Thus a most-favored-nation clause may be effective in regard to a Commonwealth country as a result of any of four types of arrangements. Such a clause may be applicable (1) as a result of automatic inclusion in one of Great Britain's commercial treaties, (2) by notification of adherence through Her Majesty's representative, (3) through utilization of a clause similar to that cited above in the treaty of 1905 with Rumania or, (4) in more recent years by a Commonwealth member's direct negotiation of a commercial treaty (containing a most-favored-nation clause) with a foreign state. The question then arises as to forms of the most-favored-nation clause which would not commit Commonwealth countries to grant to outside states concessions which they grant to each other.

II. MOST FAVORED "FOREIGN" COUNTRY

Prior to the final quarter of the nineteenth century there was little, if any, question that the self-governing colonies and the mother country could grant rights and privileges to each other without being obligated in the international legal sense to accord such rights to the signatories of treaties with the United Kingdom containing most-favored-nation clauses, unless specific provisions were made to the contrary (as, for example, in the Belgian treaty of 1862). A British authority notes that the colonies were not foreign, and cites a report made by the Law Officers of the Crown on January 14, 1882, in which they

concur in the view that the most-favoured-nation clause does not affect the right of this country to extend to the produce of its Colonies more favourable treatment than it affords to the produce of foreign or third countries. . . .¹⁵

This must have been tacitly understood by other countries. In a treaty of 1887, with Honduras,¹⁶ for example, Great Britain used a straight, unconditional most-favored-nation formula without any mention of its effect on the granting of rights and privileges by units of the Empire *inter se*.

¹³ Accounts and Papers, cited above, 1906 (Cd. 2998).

¹⁴ See Art. 25 of the 1937 treaty with Siam, cited in note 12 above.

¹⁵ Arnold D. McNair, *The Law of Treaties: British Practice and Opinions* 298 (1938). Cf. Georg Schwarzenberger, "The Most-Favoured-Nation Standard in British State Practice," 22 *Brit. Year Book of Int. Law* 96, 109 (1945).

¹⁶ Accounts and Papers, cited above, 1900 (Cd. 254).

However, there is evidence that even at this early date there was a tendency, which grew continually stronger, to spell out the fact that privileges extended between members of the Empire, and later between the Commonwealth members, did not create for foreign countries the right, under most-favored-nation clauses, to enjoy like privileges. A convenient method of accomplishing this exclusion was through use of the word "foreign." For instance, the treaty of June 15, 1883, between Great Britain and Italy obligated the two countries to impose "no other or higher duties" than those on "articles produced or manufactured in any other *foreign* country."¹⁷ Another formula was used in the commercial agreement of January 11, 1910, between Great Britain and Montenegro, which removed imperial preferences from the pale of most-favored-nation treatment by the use of the term "most favoured foreign nation."¹⁸ British treaties after that time referred, variously, to "most favoured foreign country," "most favoured foreign nation," or "any other foreign country." All of these formulas apparently produce the same effect, but the wording "any other foreign country" has appeared most frequently.

The question whether the self-governing Colonies and Dominions were in fact "foreign" countries became increasingly problematical after World War I due to their increased independence in external affairs. Their participation in the peace treaties, their separate membership in the League of Nations,¹⁹ the fact that they were able to negotiate treaties directly with foreign Powers,²⁰ the growth in separate representation abroad,²¹ and the definition of dominion status in the Balfour Formula of 1926²² made it increasingly doubtful that the Commonwealth countries should not be considered foreign countries in their relations *inter se*. The question also arose during the same period as to whether the Mandates created subsequent to World War I were "foreign countries."²³ Thus it became increasingly important to make express reservations in commercial treaties in order to maintain preferential treatment within the Common-

¹⁷ *Ibid.*, 1883 (C. 3666). Italics inserted.

¹⁸ *Ibid.*, 1910 (C. 5126).

¹⁹ See Treaty of Versailles, June 28, 1919, *ibid.*, 1919 (Cmd. 153); Treaty of Saint Germain-en-Laye, Sept. 10, 1919, *ibid.*, 1919 (Cmd. 400); Covenant of the League of Nations with a Commentary thereon, *ibid.*, 1919 (Cmd. 151).

²⁰ See Stewart, *op. cit.* 43-75, 159-204.

²¹ See P. J. Noel Baker, *The Present Judicial Status of the British Dominions in International Law* 164 ff., 250 ff. (1929).

²² Accounts and Papers, cited above, 1926 (Cmd. 2768).

²³ Great Britain began to include special articles in her commercial treaties to cover the recession to such treaties of newly acquired Mandates. See the Treaty of Commerce of July 14, 1923, with Czechoslovakia, 29 League of Nations Treaty Series 378. However, in 1932 the United Kingdom planned to grant a preference to Palestinian products and the United States objected on the basis of her Commercial Treaty of 1845 with Great Britain and the fact that Palestine was a "foreign country." Italy and Spain likewise objected on the basis of most-favored-nation clauses in their treaties with Great Britain. See 2 Papers Relating to the Foreign Relations of the United States (1932) 32, 33, 36-37.

wealth without bringing into operation the most-favored-nation clauses of treaties with foreign countries.²⁴

Great Britain continued to use the "most favoured foreign country," "most favoured foreign nation," and "any other foreign country" formulas to avoid extension to foreign countries of Imperial and Commonwealth preferences. In British commercial treaties the unconditional most-favored-nation clause for tariff matters practically disappeared by the 1920's and the formula was principally used for such matters as commercial travelers and their samples, access to courts, exemption from compulsory military service, and sometimes internal taxation.²⁵ In this same period the Dominions began to negotiate their own commercial treaties directly, and this further complicated the problem of preferences. The Canadian commercial agreements stipulated that incoming goods and produce should not be subjected to other or higher duties or imposts than those paid on the like produce of any other foreign country, but all other matters relating to the importation, exportation, or transit of goods were to be handled on a most-favored-nation basis.²⁶ The Union of South Africa probably went farther than any other self-governing Colony or Dominion in granting most-favored-nation treatment. In the Treaty of Commerce and Navigation with Germany signed September 1, 1928, South Africa granted most-favored-nation treatment in all matters except minimum rates or rebates on duties granted to the British Empire and the acquisition or ownership of property.²⁷ However, on October 29, 1929, the Irish Free State and Portugal signed a treaty of commerce and navigation containing a clause which proved to be a model for subsequent Commonwealth commercial treaties except those of the United Kingdom. An exception clause states:

It is understood that nothing in the present Treaty shall affect the right of the Government of the Irish Free State to modify, maintain, or extend preferential treatment accorded to any of the States Members of the British Commonwealth of Nations.²⁸

Subsequent to that time members of the Commonwealth, with the exception of Great Britain, who still used her old formulas, included such clauses, in one form or another, to prevent foreign countries from invoking the most-favored-nation clause to attain intra-Commonwealth preferences.²⁹

²⁴ See Schwarzenberger, *loc. cit.* 109.

²⁵ For example, see treaties of Great Britain with Spain, Oct. 31, 1922, 28 League of Nations Treaty Series 340; Latvia, June 22, 1923, 20 *ibid.* 396; Poland, Nov. 26, 1923, 28 *ibid.* 429; Finland, Dec. 14, 1923, 29 *ibid.* 130; Hungary, July 23, 1926, 67 *ibid.* 184.

²⁶ See, for example, the Canadian treaties with the Economic Union of Belgium and Luxembourg, July 3, 1924, 32 *ibid.* 36; The Netherlands, July 11, 1924, 39 *ibid.* 46.

²⁷ 95 *ibid.* 290. The latter exception was necessary as the British Merchant Shipping Act (an Imperial Act) provides that British ships can only be owned by British subjects.

²⁸ 131 *ibid.* 147.

²⁹ For example, see the Commercial Treaty of Aug. 3, 1936, between Australia and Czechoslovakia, 177 *ibid.* 246; the Commercial Agreement of July 3, 1935, between Canada and Poland, 172 *ibid.* 69; the Exchange of Notes Constituting a Trade Agree-

Although the composition of the Commonwealth changed considerably after World War II, this change has caused little if any alteration of existing practices in regard to commercial treaties. Article I of the Treaty of Friendship, Commerce and Navigation, signed December 20, 1951, between Great Britain and the Sultanate of Muscat and Oman defines the term "foreign country" as excluding not only the new Commonwealth countries of India, Pakistan and Ceylon, but also Eire and Burma, although Eire was no longer a member and Burma never chose to enter the Commonwealth.³⁰ Ireland likewise continued to protect intra-Commonwealth preferences, and in the Treaty of Friendship, Commerce and Navigation with the United States, January 21, 1950, there was provision to exclude the operation of the most-favored-nation clause in regard to any advantages extended by Ireland to "the British Commonwealth of Nations and their dependent territories."³¹

Thus at present a Commonwealth nation normally as a matter of policy does not grant complete most-favored-nation treatment to a non-Commonwealth country, with the possible exception of Eire and Burma. The practice is to grant "most favoured foreign country treatment" to outsiders, with the effect of protecting intra-Commonwealth preferences. The discriminatory effect of this is obvious, especially in the case of Eire and Burma, states which do not claim any official ties with the Commonwealth. The practice of excluding Commonwealth preferences from the operation of the most-favored-nation clause has not escaped critical notice³² and it may be that the inclusion of non-members in such a system may bring forth further criticism. Except for the greater number of "favored" nations the practice of the Commonwealth in this matter perhaps does not differ greatly from that of the United States, which still excludes the application of the most-favored-nation clause in relation to advantages accorded to Cuba and the Republic of the Philippines. However, in the case of the United States, exclusion is accomplished by exception clauses rather than by a variant of the most-favored-nation formula itself.

III. MOST FAVORED COMMONWEALTH COUNTRY

Although Imperial and Commonwealth preferences were zealously withheld from foreign countries, this does not mean that all members of the

ment between New Zealand and The Netherlands on Dec. 22, 1937, 185 *ibid.* 330; the Exchange of Notes in regard to Commercial Relations between the Union of South Africa and Brazil, April 11, 1932, 135 *ibid.* 220. The Treaty of Commerce of April 1, 1951, between India and Afghanistan does not specifically mention the Commonwealth in qualifying the most-favored-nation treatment provided for in the treaty however. Art. 16 provides that: "... 'most-favored-nation treatment' shall not be deemed to be contravened by the grant or continuance of . . . preferences or advantages accorded by either contracting party to any country, existing on the date of this agreement of such preferences or advantages. . . ." See 167 U.N. Treaty Series 120.

³⁰ 19 U.N. Treaty Series 260, 262.

³¹ T.I.A.S., No. 2155.

³² See, for example, W. S. Culbertson, *Commercial Policy in War Time and After* 302-305 (1919); R. C. Snyder, *The Most-Favored-Nation Clause* 171 (1948).

Commonwealth receive equal treatment from each other in trade preferences. As a matter of fact there is a long history of discrimination in preferences within the Commonwealth.³³ An examination of intra-Commonwealth preferences must, however, be based mainly on an examination of trade agreements (*i.e.*, instruments containing schedules on specific goods), as it is not common practice for Commonwealth countries to conclude commercial agreements of a more general type *inter se*.

The Ottawa Conference of 1932 did much to equalize preferences and allow a freer movement of goods within the Commonwealth. However, even the agreements concluded at Ottawa contain evidence of less than equal treatment by a Commonwealth state of all other Commonwealth states. The trade agreements which the United Kingdom concluded at Ottawa with the Dominions contained provisions whereby the United Kingdom would invite the non-self-governing Colonies, Protectorates and Mandates to extend to the Dominions any preferences which they accorded to any other part of the Empire and the Dominions would, in the event such preferences were extended, grant to any such territories the benefits of the preferential rates accorded to Great Britain. However, benefits which Canada enjoyed under its Trade Agreement of July 6, 1925, with the West Indies were excepted from the provisions of this agreement relating to the extension and equalization of preferences between the non-self-governing Colonies, Protectorates or Mandates. Similar provision was made in regard to preferences extended between Northern Rhodesia, Southern Rhodesia, the Union of South Africa and the Territories of the South African High Commission.³⁴

The trade agreements concluded by Canada with the Union of South Africa and Southern Rhodesia at Ottawa on August 20, 1932,³⁵ are typical intra-Commonwealth trade agreements in that they grant benefits equal to those given "any country" in relation to the goods and products specified in the attached schedules. The signatories were thus given most favored Commonwealth country treatment, but only in regard to specific goods and products. In order to assure a predetermined standard of treatment for goods not covered by the schedules of existing trade agreements, South Africa concluded rather novel *modi vivendi* on commercial matters with Canada and with the Irish Free State in 1935,³⁶ whereby the signatories would grant "most favoured foreign nation" treatment to such goods as were not covered by previous trade agreements. This latter arrangement would exclude Commonwealth preferences in regard to such goods, but would at least assure such goods of treatment equal to that granted the most favored nation outside the Commonwealth.

The trade agreement which Canada signed with the Irish Free State at Ottawa on August 20, 1932,³⁷ was unique in that it did not contain schedules

³³ See Frederic Benham, *Great Britain Under Protection* 71 ff. (1941); K. V. Meyer, *Britain's Colonies in World Trade, passim* (1948).

³⁴ Accounts and Papers, cited above, 1931-1932 (Cmd. 4174).

³⁵ 135 British and Foreign State Papers 251-264.

³⁶ 139 *ibid.* 231-234.

³⁷ 135 *ibid.* 250-251.

of preferences on specific goods or products, but merely stated that the Irish Free State would not subject Canadian goods to duties higher than those paid by "any other country." In other words, the Irish Free State granted Canada what might be termed most favored Commonwealth country treatment on all goods. In return Canada pledged that there would be no duties on Irish goods higher than those placed on similar goods of Great Britain. A similar arrangement was made in the Trade Agreement of April 2, 1951, between the United Kingdom and Pakistan. Although the latter agreement contains schedules on specific goods, it also sets forth a general obligation on the part of the signatories in regard to tariff preferences. It employs a rather complicated formula whereby most favored Commonwealth country treatment is granted to all goods of the signatories. Pakistan undertakes not to charge duties on United Kingdom goods higher than on the goods of "any other country (except Burma)" and the United Kingdom gives assurance that there will be no higher duties on Pakistani goods than on the goods of "any other country." This would seem sufficient to assure most-favored-Commonwealth treatment to the signatories, but the agreement also provides that the United Kingdom will extend to Pakistan any tariff preferences accorded to the Commonwealth countries, Southern Rhodesia, Eire or Burma. Pakistan, on her part, undertakes the same obligation in regard to tariff preferences but only in relation to the Commonwealth countries, Southern Rhodesia and Eire.

IV. IMPERIAL PREFERENCE

By means of the above-mentioned exceptions to most-favored-nation clauses, Commonwealth countries were able to maintain and expand imperial preferences. Such preferences had a long history in the British Empire and provided one of the means by which the colonial trade was developed. However, in the mid-nineteenth century the United Kingdom adopted a free-trade policy and no longer favored imperial preferences. This free-trade policy worked a hardship on numerous parts of the Empire, and the colonies continued to advocate Britain's return to a system of preferences.³⁹ By the close of the century the self-governing colonies became more persistent in the matter. At the Colonial Conference held at Ottawa in 1894 resolutions were passed in favor of imperial preferences, which were unopposed except by the United Kingdom and the colony of New South Wales.⁴⁰ Resolutions were again passed at the Colonial Conference of 1902,⁴¹ the Colonial Conference of 1907⁴² and the Imperial War Conference of 1917,⁴³ but Britain still took no action.

Meanwhile the self-governing Colonies and Dominions began to develop a system of imperial preferences. In 1897 Canada passed the Customs

³⁹ Accounts and Papers, cited above, 1950-1951 (Cmd. 8187).

⁴⁰ See R. S. Russell, *Imperial Preference* 15 ff. (1949); H. P. Whidden, Jr., *Free Trade and Discriminations in International Trade* 20 (1945).

⁴¹ Accounts and Papers, cited above, 1894 (C. 7553).

⁴² *Ib id.*, 1902 (Cd. 1299).

⁴³ *Ib id.*, 1907 (Cd. 3523).

⁴⁴ *Ib id.*, 1917-1918 (Cd. 8566).

Tariff Act which theoretically granted preferences on the basis of reciprocity to any nation, but in actuality was worded in such a manner that only the United Kingdom and one or two British colonies would have been able to meet the conditions. Belgium and Germany objected on the basis of the most-favored-nation clauses in their commercial treaties with the United Kingdom.⁴⁴ However, on July 28, 1897, the United Kingdom gave simultaneous notice to the Governments of Belgium and Germany of her desire to withdraw from the two treaties. The way was thus cleared for an extension of imperial preferences.⁴⁵ In 1898 Canada extended preferences to the products of the United Kingdom without reciprocity. Prior to World War I a number of Dominions followed Canada's lead. Although the United Kingdom did grant preferences on items in favor of the Empire after World War I, it did not reciprocate by granting a system of general imperial preferences to the Empire.⁴⁶ It was not until Great Britain reverted to protectionism with the return of the Conservatives to power and the adoption of the Import Duties Act of 1932,⁴⁷ that she was prepared to adopt a general system of imperial preference.

At the Imperial Economic Conference of 1932 at Ottawa the United Kingdom finally accepted the extension of imperial preference throughout the Empire. Eleven bilateral trade agreements were signed and the whole system of Empire preferences was augmented and co-ordinated. The relationship between the most-favored-nation clause in commercial agreements and these preferences was also discussed. The summary of the conference's conclusions contains the following statement:

. . . Each Government will determine its particular policy in dealing with this matter, but the representatives of the various Governments on the Committee stated that it was their policy that no treaty obligations into which they might enter in the future should be allowed to interfere with any mutual preferences which Governments of the Commonwealth might accord to each other, and that they would free themselves from existing treaties, if any, which might so interfere. They would, in fact, take all the steps necessary to implement and safe-guard whatever preferences might be so granted.

The door was not closed entirely, as the conference went on to note that this did "not preclude a foreign country from seeking the consent of various Governments of the British Commonwealth to a waiver of their rights in particular cases. . . ."⁴⁸ However, intra-Commonwealth preferences were greatly strengthened by the Ottawa Conference and the trade agreements concluded at that time.

The year 1932 set the "high-water mark" of imperial preferences. This resurgence of imperial preference unfortunately occurred during a

⁴⁴ See p. 456 above.

⁴⁵ Stewart, *op. cit.* 76 ff.

⁴⁶ See Colonial Tariff Policies, cited above, 630 ff.

⁴⁷ 22-23 Geo. 5. c. 8.

⁴⁸ Cmd. 4174, cited above. An example of such a waiver of rights is to be found in the exchange of notes between Canada and South Africa on Nov. 16, 1938, whereby South Africa waived certain preferences in order that Canada might conclude a trade agreement with the United States. See 142 British and Foreign State Papers 312-314.

time of international economic depression and a dislocation of the normal flow of trade due to a revival of highly protective tariff policies. The Commonwealth was also placed in the position of blocking other states from attempting to attain a system of preferences in a manner very similar to that utilized by the states of the Commonwealth at Ottawa. Belgium, Luxembourg and The Netherlands had signed the Ouchy Convention on July 14, 1932, which was a collective effort to lower trade barriers, and provided for free entry on the part of the countries which were not signatories. However, this movement was doomed to failure at its inception. At the Ottawa Conference in that year a resolution was passed which drew attention to "recent tendencies in foreign countries to conclude regional arrangements between themselves for the mutual accord of preferences." Although the Ouchy Convention was not specifically mentioned, the implication was clear. The resolution noted general agreement

that foreign countries which had existing treaty obligations to grant most-favoured-nation treatment to the products of particular parts of the Commonwealth could not be allowed to override such obligations by regional arrangements of the character in question.⁴⁹

The Hague Convention of May 28, 1937, parties to which were the signatories to the Ouchy Convention, Norway, Denmark, Sweden and Finland, merely aimed at preventing a further rise in tariff rates and removal of quantitative restrictions on imports. It suffered the same fate as the Ouchy Convention, due in part to the United Kingdom's insistence that its most-favored-nation obligations be respected.⁵⁰ However, the Commonwealth's legal position was a correct one. It had built up a network of reservations exempting imperial preferences from the operation of the most-favored-nation clauses of its treaties. Such reservations the signatories of the Ouchy and Hague Conventions did not possess and were unable to attain in relation to those instruments.

The United States Government hoped by means of the Trade Agreements Act, 1934, to restore a freer movement of international trade by the reduction of existing duties or import restrictions. In negotiating trade agreements under this Act the Government did not hesitate to express its opinion on imperial preferences which, of course, hampered the negotiation of such agreements with Commonwealth countries. In preliminary discussions on an Anglo-American trade agreement in 1937 Secretary of State Hull noted that the British could obtain concessions only at the expense of "less exclusiveness in the British Empire."⁵¹ Secretary Hull informed the British Ambassador in 1938 that the United States Government had encountered "four times the difficulty" in negotiations with the United Kingdom than it had experienced in negotiating the other eighteen agreements under the Act. He noted that imperial preference was the

⁴⁹ *Op. cit.* 4174, cited above.

⁵⁰ For an account of Great Britain's reactions to the Ouchy and Hague Conventions see W. A. Brown, *The United States and the Restoration of World Trade* 41-42 (1950); Jacob Viner, *The Customs Union Issue* 30-32 (1950).

⁵¹ *Foreign Relations of the United States* (1937) 4.

chief complication and called it a "seclusionist policy" which would "reduce the sum total of world trade."⁵² However, the United States did sign reciprocal trade agreements with the United Kingdom⁵³ and Canada,⁵⁴ respectively, in 1938, which provided for a considerable lowering of duties and a relaxation of the imperial preference system.

The United States attained a further concession in Article VII of the Mutual Aid Agreement of February 23, 1942, signed by the United States and the United Kingdom. This article, which was regarded as a model in Mutual Aid Agreements with other countries, pledged the signatories to action directed toward "the elimination of all forms of discriminatory treatment in international commerce, and to the reduction of tariffs and other trade barriers."⁵⁵ In 1945 the two countries carried out further negotiations in the light of Article VII and in connection with the loan to Great Britain under the Financial Agreement of December 6, 1945.⁵⁶ In connection with the latter agreement, and on the date of its signature, a joint statement was issued by the two countries⁵⁷ endorsing a document prepared by the United States Government which advocated "arrangements for the substantial reduction of tariffs and for the elimination of tariff preferences."⁵⁸

Although there had been a general weakening of imperial preferences subsequent to the Ottawa Conference of 1932,⁵⁹ the United Kingdom still had not, by these agreements, abandoned preferences. On December 6, 1945, and again on November 12, 1946, Prime Minister Attlee said:

. . . there is no commitment on any country in advance of negotiations to reduce or eliminate any particular margin of preference. . . . It is recognized that reduction or elimination of preferences can only be considered in relation to and in return for reduction of tariffs and other barriers to world trade in general which would make for mutually advantageous arrangements for the expansion of trade. There is thus no question of any unilateral surrender of preferences.⁶⁰

However, the Commonwealth countries subsequently made a number of concessions on the international level in regard to imperial preferences. The United States continued to press for the limitation of imperial preferences by the International Trade Organization. The Havana Charter for an International Trade Organization of March 24, 1948, placed considerable restrictions on imperial preferences.⁶¹ Further concessions were also made in the General Agreement on Tariffs and Trade. The latter

⁵² 2 *ibid.* (1938) 67.

⁵³ Executive Agreement Series, No. 164.

⁵⁴ *Ibid.*, No. 149.

⁵⁵ *Ibid.*, No. 241.

⁵⁶ T.I.A.S., No. 1545.

⁵⁷ For text see Anglo-American Financial and Commercial Agreements, December, 1945 (Dept. of State Pub. 2439, Commercial Policy Series 80).

⁵⁸ For text see Proposals for Expansion of World Trade and Development, November, 1945 (Dept. of State Pub. 2411, Commercial Policy Series 79).

⁵⁹ Whidden, *op. cit.* 24-26.

⁶⁰ H. C. Debates, 1946-1947, Vol. 430, col. 34.

⁶¹ See Brown, *op. cit.* 69-72; Clair Wilcox, A Charter for World Trade 69-70 (1949); U. S. Dept. of State, Havana Charter for an International Trade Organization, March 24, 1948 (Pub. 3206, Commercial Policy Series 114) 45 ff.

Agreement, although recognizing imperial preferences, does limit them and makes a rather abrupt change from the previous commercial policy of the Commonwealth. Article I, paragraph 2 (a), recognizes the exclusion of Commonwealth preferences *inter se* from the operation of most-favored-nation clauses in the commercial agreements of Commonwealth countries. Although existing intra-Commonwealth preferences are protected, Article I, paragraph 4, limits the further extension of any such preferences after April 10, 1947, except in the case of those Commonwealth countries who elected to use an earlier date as set forth in Annex G.⁶² The United Kingdom⁶³ and Australia⁶⁴ have both been granted waivers from this prohibition. However, such waivers would appear to concern relatively unimportant items and the Agreement has prevented any further growth of Commonwealth preferences.⁶⁵

V. CONCLUSIONS

The foregoing brief examination indicates that the Commonwealth countries exclude intra-Commonwealth preferences from the operation of the most favored-nation clauses in their commercial agreements with the effect that non-Commonwealth nations attain only most-favored "foreign" nation treatment. Due to the varied preferences extended within the Commonwealth itself, a Commonwealth country may in reality be assured of complete most-favored-nation treatment only through the conclusion of provisions in intra-Commonwealth agreements which grant most favored Commonwealth country treatment. For the student of Commonwealth affairs perhaps the most unique aspect of these agreements is the fact that Eire and Burma are still included in the system of Commonwealth preferences despite the fact that they are actually not members.

When a group of states are linked by a multilateral undertaking to follow a specified policy in relation to each other, whether this involves actual granting of tariff concessions or only the commitment to try to negotiate for tariff concessions at periodic meetings, the consolidation of

⁶² The Contracting Parties to the General Agreement on Tariffs and Trade, *Basic Instruments and Selected Documents*, May, 1953, Vol. I, pp. 14-15, 63-64, 66. It is to be noted that Pakistan in signing this Agreement noted that under the provisions of Art. XXV it could not extend the most-favored nation treatment outlined therein to the Union of South Africa. India in signing this Agreement withheld its consent to Art. XXV to the application of the Agreement between India and South Africa.

⁶³ U.N. Treaty Series 313, 316. Apparently Pakistan later withdrew its condition.

⁶⁴ *Basic Instruments and Selected Documents*, cited above, January, 1951, 2nd Supp., pp. 20-22, and June, 1955, 3rd Supp., pp. 25-26.

⁶⁵ *Ibid.*, January, 1951, 2nd Supp., p. 18; and January, 1957, 5th Supp., p. 31.

⁶⁶ The desirability of this arrangement has not gone unquestioned. At Westminster in 1951, favoring a further increase of imperial preference have asked that the restrictions imposed by the General Agreement on Tariffs and Trade be removed. See *Parliamentary Debates*, 1951-1952, Vol. 495, cols. 333-335, and Vol. 499, cols. 1651-1671. At the Commonwealth Economic Conference of 1952 Great Britain proposed that the Commonwealth countries join to seek release from the "no new preference" rule in the General Agreement; however, the Commonwealth countries were divided on the question. *Account and Papers*, cited above, 1952-1953 (Cmd. 8717).

gains achieved may involve exclusion of outside states (eligible but not electing to join in the agreement) from intra-group treatment. In the commercial treaties which the United States concluded in the early post-World-War II period there appeared the so-called "Montevideo clause" as a means of such exclusion.⁶⁶ After the negotiation of the General Agreement on Tariffs and Trade, the same general effect resulted from an exceptions clause specifically mentioning that Agreement.⁶⁷ The result was that a commitment by the United States to most-favored-nation treatment in a treaty with a state not a party to the General Agreement would apparently mean that the non-member state would receive what may be roughly described as the non-GATT treatment. Practice of the Commonwealth nations adds another to the types of limitations or exceptions in most-favored-nation usage.

Effort for restoration of world trade since World War II has perhaps justified a very considerable amount of restriction upon the most general most-favored-nation formula in order to induce states to accept the principle on some basis. A too great multiplication of such restrictions might conceivably herald what would be essentially a return to conditionality in the application of the most used general standard in international commercial relations.

⁶⁶ Illustrated in Art. XXVI (3c) of the treaty signed with Nationalist China in 1946 (T.I.A.S., No. 1871): By the provision referred to, the provisions of the treaty according treatment no less favorable than that accorded to any third country were not to apply to "advantages accorded to third countries pursuant to a multilateral convention of general applicability, including a trade area of substantial size, having as its objective the liberalization and promotion of international trade or other international economic intercourse, and open to adoption by all the United Nations." By an exchange of notes in 1948 this language was related to the General Agreement on Tariffs and Trade and to Chapter IV of the Havana Charter for an International Trade Organization (the latter of which did not come into effect).

⁶⁷ See, for example, Art. XXI (2) of the Commercial Treaty with Haiti in 1955, Sen. Ex. H, 84th Cong., 1st Sess., whereby "the most-favored-nation provisions of the present Treaty relating to the treatment of goods shall not apply to advantages accorded by either Party to any country or area with respect to which special treatment has been permitted under the General Agreement on Tariffs and Trade."

POSTWAR NATIONALIZATIONS AND ALIEN PROPERTY IN BULGARIA

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I. PRELIMINARY

1. In the course of the last decade, students of legal and economic questions have been attempting to throw some light on the problem of nationalizations in the Soviet satellite countries in general, and in Bulgaria in particular.¹

¹Ivan Altunov, "Mezhdunarodno-chastno-pravni problemi na natsionalizatsiite i planiraveto" [Private International Law Problems of Nationalizations and Economic Planning], in *Pravni problemi na dърzhavniia narodostopanski plan*, class II, kniga 1 (Sofia, 1953) 299-325; N. R. Doman, "Compensation for Nationalized Property in Post War Europe," 3 *Int. Law Q.* 323-342 (1950); *idem*, "Post-War Nationalization of Foreign Property in Europe," 48 *Col. Law Rev.* 1125-1161 (1948); Martin Doman, "On the Extraterritorial Effect of Foreign Expropriation Decrees," 4 *Western Int. L. Q.* 12-16 (1951); Heinrich Drost, "Die Rechtslage des deutschen Auslandsvermögens," 2 *Archiv des Völkerrechts* 298-304 (1949/50); Alfred Drucker, "The Nationalization of United Nations Property in Europe," 36 *Grotius Society Transactions* 75 ff. (1951); Lazar Foesaneanu, "Les conséquences internationales des nationalisations," 18 *Politique Etrangère* 35-50 (1953); S. Friedmann, *Expropriation in International Law* (London, Stevens & Sons, 1953); J. C. G. G. "Expropriation and Nationalization in Hungary, Bulgaria and Rumania," 4 *Int. and Comp. Law Q.* 14-28 (1952); G. A. van Hecke, "Confiscation, Expropriation and the Conflict of Laws," 4 *Int. Law Q.* 345-357 (1951); Samuel Heiman, "War Damage and Nationalization in Eastern Europe," 16 *Law and Contemporary Problems* 298-338 (1951); A. N. Iodkovskii, *Natsionalizatsiia v evropeiskikh stranakh na puti demokratii* [Nationalization in the People's Democracies Countries in Europe. Comparative Study of Legislation] (Moscow, 1953); Konstantin Katzarov, "Die Nationalisierung in Osteuropa," 3 *Osteuropa-Recht* 8-17 (1957); A. K. Kuhn, "Nationalization of Foreign-Owned Property in Its Impact on International Law," 45 *A.J.I.L.* 709-712 (1951); Vladimir Kutikov, "Planiraveto i natsionalizatsiite v NR Bъlgariia i tiakmoto otzazhenie vъrkhu bъlgarskata sistema na mezhdunarodnoto chastno pravo" [Economic Planning and Nationalizations in the PR of Bulgaria and Their Effects upon the Bulgarian System of Private International Law], in *Pravni problemi na dърzhavniia narodostopanski plan*, class II, kniga 1 (Sofia, 1953) 327-358; Nikola Manchev and Ivan Dermendzhiev, "Promishlenoto pravo, stroitelstvo i stroitelno zakonodatel'stvo" [Legislation on Industry, Agriculture, Commerce and Building Construction], in *Pravni problemi na dърzhavniia narodostopanski plan*, kniga 1 (Sofia, 1951) 22-63; F. A. Mann, "German External Assets," 24 *British Year Book of Int. Law* 239-257 (1947); Andrew Martin, "Private Property, Rights, and Interests in the Paris Peace Treaties," *ibid.* 273-300; Edward D. Re, "The Nationalization of Foreign-Owned Property," 30 *Minn. Law Rev.* 323-342 (1952); Ignaz Schiffler-Holowaldern, "Extraterritorial Effect of Confiscation and Expropriation," 49 *Mil. Law Rev.* 851-868 (1951); *idem*, *Internationales Konfiskations- und Enteignungsrecht* (Berlin-Ti bingen, 1951); S. L. Sharp, *The Nationalization of Key Industries in Eastern Europe* (Washington, D. C., 1946).

The present article is an attempt to present a more complete picture of Bulgarian postwar legislation on the planning and nationalization of the national economy. Its more immediate purpose is to analyze the effects of this legislation upon aliens and their property rights and interests. In other words, the study will relate primarily the Bulgarian Government's treatment of alien property (government and private; enemy alien and non-enemy alien) found within and without its borders during and after World War II.

2. It may be convenient to preface the discussions and analyses in this study with some short observations on the terminology and basic principles of international law directly involved in the problem defined above.

Nationalization is the taking of property which may be either confiscation or expropriation according to whether or not compensation is made. Nationalization resembles confiscation if, in the taking of property, compensation is refused or the compensation offered or granted is inadequate; nationalization resembles expropriation if the taking or use of property by public authority is accompanied by adequate compensation. As to the term "socialization," it may be stated here that it was never used in Bulgarian legislation. The question as to whether or not a given measure is confiscation depends upon the conditions of each particular case, and it is not possible to state a general rule. Nationalization laws and decrees, with few exceptions, do not profess to be confiscatory; nevertheless, in many cases confiscatory features are predominant. This is so because the compensation may be inadequate, paid with great delay, paid into a blocked or non-transferable account or in long-term government bonds redeemable in local blocked currency, or subject to special taxation. And this is the case with most of the Bulgarian nationalization laws, although only the terms "expropriation" or "nationalization" are used.

Another point which should be cleared up here is that nationalizations in Bulgaria have been achieved mainly through direct legislative expropriatory measures and thus present no question as to their existence. Moreover, the Bulgarian Government issued Edict No. 169 of July 2, 1955,² which contains, along with provisions dealing with certain legal matters connected with the nationalization and expropriation of private property, a list of laws and decrees expressly declared to be nationalization and expropriation legislative enactments.

3. The postwar legislation on the establishment of government-planned economy and the nationalization of the national economy in Bulgaria affected not only its own citizens but foreign nationals and the interests of foreign governments as well. As a rule no international law is involved when a sovereign government seizes the property of its own nationals; however, when foreign nationals are affected by the expropriation measures, certain rules of international law find application. In this connection it

² Bulgarian Official Law Gazette No. 60, July 26, 1955. This publication was called *Dürzhaven Vestnik* until Nov. 30, 1950; since Dec. 1, 1950, it has the title *Izvestiia na Presidiuma na Narodното Säbranie*, hereinafter abbreviated as IPNS. Its previous title is hereinafter referred to as DV.

must be pointed out here that the problem of nationalization and economic planning, discussed from the viewpoint of international law, must be approached differently. When there is a question of expropriation and nationalization there is always a conflict of law involved, while in the case of economic planning there is a question of the scope of a foreigner's rights or rather of his obligations to fulfill the prescriptions of the government economic plan. But in both cases international law has to be applied whenever the measures concerning economic planning or nationalization affect physical and juridical persons who do not possess the nationality of the country undertaking these measures, or when the nationalized property or enterprise, although having the nationality of such country, possesses certain capital or other interests abroad.

The problem of how the doctrines of the national treatment of foreigners in case of nationalization (*i.e.*, whether there is discrimination in respect to foreigners) and of the extraterritorial effect of expropriation measures are reflected in Bulgarian legislation requires further study.

The question of obtaining compensation for the nationalized property of foreign nationals is also a question of international law, since compensation should be paid according to its standard rules. The predominant view of international law today seems to recognize the right of a sovereign government to undertake social experiments, provided it grants adequate, fair, and prompt compensation to foreign property-owners.³

4. Finally, as a matter of preliminary information to serve as a background for the study to follow, it seems pertinent to indicate that the Bulgarian legislation concerning planned economy and nationalization was mainly the result of the change in the form of government. As is well known, shortly before and after the end of World War II, in a number of countries in Eastern and Central Europe, so-called People's Democratic Republics were established as a result of Soviet military occupation and political influence.

After the *coup d'état* of September 9, 1944, and in the course of the following years Bulgaria also was politically, economically and socially re-organized into a people's democracy. All measures aiming at its re-organization allegedly sprang from an economic philosophy based on the establishment of a government-planned economy and the nationalization of the national economy, as well as from a social-legal theory patterned after that in the Soviet Union.

5. The new government first introduced, rather hurriedly, provisional measures of economic administration as regards the property of absent persons or persons who were collaborators or enemies or were regarded as such. A great number of laws and decrees, largely penal in nature, were enacted, and on the basis of these private property was taken away from its owners. To illustrate: Based upon the Law on Prosecution of War Criminals by the People's Courts of October 6, 1944,⁴ the Law on Supply

³ Akama, *loc. cit.* 505; Doman, 48 Col. Law Rev. 1127.

⁴ DV No. 219.

and Prices of September 13, 1945,⁵ the Law on Confiscation of Property Acquired by Speculation or Illegal Means of April 5, 1946,⁶ and other similar Acts, confiscation of convicted persons' property of all kinds was usually included in their penalties. These enactments, especially the law of April 5, 1946, were, in the hands of the People's Democratic Government, an instrument for carrying out the transformation of the social-economic structure of the country at this initial stage of development. Later, the same law was also used to transfer property to the government whenever this could not be accomplished by the general nationalization laws.⁷

All this, however, was only the groundwork for the adoption of measures of far-reaching importance and consequences. Immediately thereafter, the new government undertook to introduce extensive legislation aimed at the establishment of a regime of government-planned economy and the nationalization of the national economy which, as already stated, affected not only Bulgarian nationals but aliens and property owned by aliens and foreign governments as well.

II. ALIEN PROPERTY IN BULGARIA DURING AND AFTER WORLD WAR II

Alien property (government and private; enemy and non-enemy), as well as alien rights and interests in Bulgaria, were vitally affected by the domestic legislation and international agreements enacted and entered into during and after World War II. Alien property and rights were seized or placed under control as a wartime measure; they were transferred to foreign countries as war reparations; they were placed under the regime of planned economy; and they were subject to expropriation and nationalization.

In this connection, taking into consideration the international events in which Bulgaria was involved, three periods could be distinguished:

(a) The period from the outbreak of war between Bulgaria and the Allied and Associated Powers⁸ to the signing of the Armistice Agreement, October 28, 1944;

(b) the period from the outbreak of war between Bulgaria and the

⁵ DV No. 213.

⁶ DV No. 78.

⁷ Sharp, *op. cit.* 28-29. This law is applicable to acquisition of property dating back to Jan. 1, 1935, and defines as "speculation" any activity which has disproportionately increased the material fortune of persons and firms through profits, commissions, bonuses, incomes "at the time of difficulty for the State." "Illegal property" is that acquired in connection with anti-national activity or through transgression of official duties.

⁸ DV No. 77. As used in this paper, the term "Allied and Associated Powers" means in relation to Bulgaria: the U. S. A., United Kingdom and the U.S.S.R. The war between Bulgaria and the U. S. A. broke out on Dec. 12, 1941; the Soviet Union declared war on Bulgaria on Sept. 5, 1944.

Axis Powers⁹ to the signing of the Peace Treaty between Bulgaria and the Allied Powers, February 10, 1947;

(c) the period after the signing of the Peace Treaty.¹⁰

1. Exactly four months after Bulgaria went to war with the Allied and Associated Powers, the Bulgarian Government enacted the Law on Control over All Property of Nationals, Physical and Juridical Persons, with Residence or Having Their Seat in Enemy Countries, on April 13, 1942.¹¹ This wartime measure affected the private property of enemy aliens as well as the property owned by enemy foreign governments located within the jurisdiction of Bulgaria. The control was vested in the Office of the Custodian of Enemy Property, attached to the Ministry of Commerce, Industry and Labor. The seizure of each particular piece of real property and all government measures regarding it were recorded with the Office of Records and such properties were placed under a caretaker. This law¹² authorized the Council of Ministers to apply the law to specific enemy countries at its own discretion.¹³ In fact, the extension of the effect of this law to cover the United States of America, Great Britain, Australia and New Zealand was made by Resolution No. 37 of April 29, 1942.¹⁴ Another resolution, No. 41 of May 20, 1942,¹⁵ included all English possessions—colonies, Dominions, etcetera—in the list of enemy countries, with the specification that this law be applied to all nationals of enemy countries regardless of whether these nationals resided in the enemy countries, in Bulgaria, or elsewhere abroad.

As a result of the change of government on September 9, 1944, Bulgaria came to terms with the United States, Great Britain and the Soviet Union and its position as enemy country changed to that of vanquished country subject to the regime of an armistice. The formal Armistice Agreement was concluded¹⁶ on October 28, 1944 and, with respect to enemy alien property in Bulgaria, provided the following:

Article 9. The Government of Bulgaria will restore all property of the United Nations and their nationals . . . and will make such reparation for loss and damage caused by the war to the United Nations . . . as may be determined later.

Article 10. The Government of Bulgaria will restore all rights and interests of the United Nations and their nationals in Bulgaria.

Anticipating these provisions of the Armistice Agreement, the Bulgarian Council of Ministers resolved on September 15, 1944,¹⁷ to repeal the resolutions of

⁹ According to *Deutsches Vermögen im Ausland, Internationale Vereinbarungen und Abkommen* (Gesetzgebung (herausgegeben vom Bundesministerium der Justiz, Köln), 1945), p. 10, diplomatic relations between Bulgaria and Germany were severed on Sept. 7, 1941, and the war between these two countries was declared on Sept. 8, 1941. The war on Germany was declared by the Bulgarian Government headed by K. Muraviev which was overthrown one day later by the Fatherland Front.

¹⁰ The Peace Treaty with Bulgaria became effective as of Sept. 15, 1947.

¹¹ DV No. 77.

¹² Section 15.

¹³ This law was clarified by a special Regulation concerning its application, Aug. 31, 1942, DV No. 193.

¹⁴ DV No. 94, May 2, 1942.

¹⁵ DV No. 109, May 22, 1942.

¹⁶ 39 A.J.L.L. Supp. 93-96 (1945).

¹⁷ DV No. 204, Supp., Sept. 19, 1944.

April 29 and May 20, 1942, and to discontinue the operation of the Law on Control Over Alien Enemy Property of April 13, 1942, with regard to nationals of the Allied and Associated Powers. Section 2 of Cabinet Resolution No. 3 provided as follows:

Section 2. All properties placed under control by virtue of the above-mentioned resolutions shall be restored to the possession of their owners or to the possession of the owners' authorized representatives within the extent of their powers of attorney.

The liquidator of the Office of the Custodian of Enemy Property shall continue to exercise due care as caretaker of those properties whose owners, or the authorized representatives thereof, are not in Bulgaria in order that they may return and assume possession.

2. At the same time, as a result of the outbreak of war between Bulgaria and Germany on September 8, 1944, the new Bulgarian Government extended the provisions of the Law on Control Over Alien Enemy Property of 1942 to German property and rights by Resolution No. 4 of September 15, 1944.¹⁸ A few months later, Hungarian property and property belonging to the territories under Hungarian and German control also fell under these provisions, as specified by Cabinet Resolution No. 36 of December 21, 1944.¹⁹ Furthermore, the same law applied to the German, Italian and Hungarian schools in Bulgaria and their appurtenances, as provided by Resolution No. 1 of September 27, 1944.²⁰ Later on, Resolution No. 2 of August 20, 1946,²¹ supplementing the previous measures, ordered the declaration of all patents, trademarks and the like in the ownership of German and Hungarian physical and juridical persons within 15 days after the publication of this Act in the official law gazette.

The above-mentioned measures against the property and rights of the Axis Powers in Bulgaria were taken in anticipation or pursuance of the prescriptions of the Armistice Agreement of October 28, 1944, especially in accordance with its Article 13, which read as follows:

Article 13. The Government of Bulgaria undertakes not to permit the removal or expropriation of any form of property (including

¹⁸ DV No. 204, Supp., Sept. 19, 1944. This Resolution was explained in some detail by the Circular Letter of the Ministry of Commerce, Industry and Labor, No. 1142 of Sept. 21, 1944, DV No. 206. On Aug. 6, 1945 (DV No. 183, Aug. 9, 1945), the Ministry of Commerce and Industry issued a Circular Letter No. 4252 ordering all government, government autonomous and municipal offices as well as all private banks, associations and persons to declare all real and personal property belonging to enemy citizens (German and Hungarian) and all debts to physical and juridical persons residing or having their seats in enemy countries (Germany or Hungary).

¹⁹ DV No. 1, Jan. 2, 1945. All these measures were supplemented by the 5th Resolution of the Cabinet of June 27, 1946 (DV No. 150, July 5, 1946). The latter provided that all physical and juridical persons of German and Hungarian citizenship were to declare their property possessed as of Sept. 5, 1944, within 15 days. This act warned that "this is the last prolongation of the terms" for declaration of the property. Also commercial firms which were in liquidation were ordered to register all securities belonging to German and Hungarian citizens (DV No. 235, Oct. 14, 1946).

²⁰ DV No. 217, Oct. 4, 1944.

²¹ DV No. 196, Aug. 28, 1946.

movables and currency), belonging to Germany and Hungary or to their nationals or to persons resident in their territories or in territories occupied by them, without the permission of the Allied Control Commission. The Government of Bulgaria will safeguard such property in the manner specified by the Allied Control Commission.

It must be pointed out here that in connection with the administration of alien property and the fulfillment of the Armistice Agreement, the new Bulgarian Government amended the original Law on Control over Alien Enemy Property of April 13, 1942, by a special law passed on October 4, 1945,²² whereby the Office of the Commissioner to Carry Out the Armistice Agreement was created. Subsequently, by a law of August 16, 1946,²³ the Office of Custodian of Enemy Property was subordinated to the authority of the Office of the Commissioner to Carry Out the Armistice Agreement, who was at the same time Minister of Foreign Affairs.

The Conference of the Big Three (the Allied Powers: U. S. A., Great Britain and U.S.S.R.) in Berlin (Potsdam), July 17–August 2, 1945, made, among others, the decision (August 2, 1945) concerning the reparations which Germany was to pay to United Nations nationals and peoples.²⁴ As stated in Chapter IV of the Potsdam Declaration, it was agreed that reparation claims of the Soviet Union (which undertook to settle Poland's claims from its own share of reparations), the United States, the United Kingdom, and "other countries entitled to reparations" should be met by removals from the zones of occupation in Germany and "from appropriate German external assets." This agreement was supplemented by provisions which contained mutual waivers. The United States and the United Kingdom agreed to "renounce their claims in respect of reparations to . . . German foreign assets in Bulgaria, Finland, Hungary, Romania and Western Austria," and the Soviet Union renounced such claims to German foreign assets in countries other than those five. The result therefore was that assets in the five eastern countries were to be allocated to the Soviet Union, while the assets in other foreign countries were to be shared by the rest of the claimant states.²⁵

As a result of this conference the new Bulgarian Government passed special legislation dealing with alien enemy property, especially that located in Bulgaria but possessed by the German Government and nationals.

Thus, referring to the decisions of this conference, the Bulgarian Government enacted, on May 31, 1946,²⁶ a Law to Transfer the German Property in Bulgaria into the Ownership of the U.S.S.R. According to Section 1 of this law, as a partial compensation for the losses and damage caused to the U.S.S.R. by Germany, all property in the ownership of the German Government and its nationals, physical and juridical persons, and located in Bulgaria on September 5, 1944 (the date when the Soviet Union declared war on Bulgaria), and enumerated in a list approved by the Bulgarian Council of Ministers and the Allied Control Commission at

²² BV No. 231.

²³ DV No. 186.

²⁴ 39 A.J.I.L. Supp. 245 at 251 (1945).

²⁵ Mann, *loc. cit.* 239.

²⁶ DV No. 120, Supp.

Sofia, was declared in the ownership of the U.S.S.R. Under the term "property" the law understood shares, assets, rights and any other property. Moreover, the law extended the application of its provisions also to two other categories of property: (a) property which at the time of the enactment of this law was not included in the list mentioned, and (b) such property as was under the authority and disposal of whatever other physical and juridical persons and agencies, including government and autonomous agencies and communities. Pursuant to this law, on July 6, 1946,²⁷ the Commissioner to Carry Out the Armistice Agreement issued a detailed ordinance concerning the procedure for transferring shares and other assets belonging to German nationals to the Administration of Soviet Property at the Trade Mission of the U.S.S.R. in Bulgaria.²⁸

Two months later, by another Order of the Commissioner of September 7, 1946,²⁹ all owners, owners' authorized representatives, caretakers and possessors (including government, autonomous and public agencies) were required to declare, within 20 days after the publication of this order, all movable and immovable property, including securities, deposits, and the like belonging to Italian citizens and juridical persons, regardless of their residence, domicile or seat. This applied to juridical persons in Bulgaria having Italian capital participation as well. The declaration had to be made as of January 1 and August 1, 1946. However, no decree was published by the Bulgarian Government as to whether the Italian property should be transferred to the ownership of the Soviet Union.

The Law of May 31, 1946, was enacted long before the signing of the Peace Treaty with Bulgaria on February 10, 1947.³⁰ The Treaty, which came into force on September 15, 1947, provided in its Article 24 as follows:

Article 24

Bulgaria recognizes that the Soviet Union is entitled to all German assets in Bulgaria transferred to the Soviet Union by the Control Council for Germany and undertakes to take all necessary measures to facilitate such transfers.³¹

In this connection it is of interest to mention the views of the United States Government on the subject of the transfer to the Soviet Union of German assets in Bulgaria (Hungary and Rumania) expressed in a Note

²⁷ DV No. 164, July 22, 1946.

²⁸ Beginning Sept. 16, 1946, the Commissioner to Carry Out the Armistice Agreement issued a great number of orders declaring certain shares (former German property) which were not transferred in time to the Soviet Union as null and void and ordered the companies to issue new shares. These orders were published in DV No. 211, Sept. 16, 1946; No. 235, Oct. 14, 1946; No. 269, Nov. 22, 1946; No. 286, Dec. 12, 1946; No. 13, Jan. 18, 1947; No. 41, Feb. 20, 1947; No. 184, Aug. 11, 1947; No. 198, Aug. 27, 1947.

²⁹ DV No. 205.

³⁰ DV No. 201, Aug. 30, 1947.

³¹ 42 A.J.I.L. Supp. 188 (1948). According to *Das Deutsche Auslandsvermögen, Uebersicht über den Stand Oktober 1949 und Anregungen für die weitere Behandlung* (herausgegeben vom Deutsches Büro für Friedensfragen in Stuttgart, den 20. November, 1949, mimeographed), p. 2 of Appendix A, the German assets in Bulgaria were 14,000,000 dollars (estimated on the 1938/9 purchasing power of the dollar).

which the United States Ambassador handed to the Soviet Minister of Foreign Affairs on July 29, 1947,³² and which stated *inter alia* that:

Inasmuch as transfer to the Soviet Union of German assets in former satellite countries is provided for by peace treaties [. . . Article 24 of the Bulgarian treaty . . .] the United States government cannot regard transfers made prior to the coming into force of the treaties as being more than of provisional character.

Furthermore, the United States government can recognize only transfers made in accordance with treaty terms, which is to say, as provided by the Control Council for Germany.

As a general principle beneficial rights of the United Nations countries in any German assets are not to be transferred.

As already pointed out, the provision of Article 24 of the Peace Treaty was fulfilled by the Bulgarian Government by the Law of May 31, 1946. The only problem to be settled was that of the enterprises with former German capital participation. Later on, a special Edict was issued on May 18, 1948,³³ to regulate this question.

3 In connection with the property of United Nations nationals, the Peace Treaty with Bulgaria only provided for the restitution of the property seized or sequestered during World War II and did not prohibit the application of similar measures after the war, when a *pro forma* restitution was made. The pertinent article of the Peace Treaty provided:

Article 23

1. Insofar as Bulgaria has not already done so, Bulgaria shall restore all legal rights and interests in Bulgaria of the United Nations and their nationals as they existed on April 24, 1941, and shall return all property in Bulgaria of the United Nations and their nationals as it now exists.

2. The Bulgarian Government undertakes that all property, rights and interests passing under this Article shall be restored free of all encumbrances and charges of any kind to which they may have become subject as a result of the war and without the imposition of any charges by the Bulgarian Government in connection with their return. The Bulgarian Government shall nullify all measures, including seizures, sequestration or control, taken by it against United Nations property between April 24, 1941, and the coming into force of the present Treaty. In cases where the property has not been returned within six months from the coming into force of the present Treaty, application shall be made to the Bulgarian authorities not later than twelve months from the coming into force of the Treaty, except in cases in which the claimant is able to show that he could not file his application within this period. . . .³⁴

Article 23 of the Peace Treaty with Bulgaria does not contain a special clause, as do the treaties with Rumania and Hungary, providing for compensation and restitution of property to persons who have been subject

³² 17 Dept. of State Bulletin 298 (Aug. 10, 1947).

³³ DV No. 114.

³⁴ 42 A.J.I.L. Supp. 186 (1948).

to forced measures on account of their racial origin or religion. Thus it was possible for the Bulgarian Government to return property belonging to United Nations nationals as demanded by the Peace Treaty, and, subsequent to the return, again seize or sequester it by adopting new measures (regime of planned economy and nationalization) that are not covered by prohibition clauses of the Peace Treaty.

The Peace Treaty with Bulgaria does not contain any clauses guaranteeing that United Nations nationals will enjoy their property rights or in case of expropriation will be paid according to the rules of international law. In other words, the Peace Treaty with Bulgaria does not exempt from nationalization the property of nationals of Member States of the United Nations which was acquired as a result of the implementation of the Armistice Agreement and the Peace Treaty itself. And the Bulgarian expropriatory laws promulgated after the signing of the Peace Treaty on February 10, 1947, contain no provision safeguarding United Nations property against measures of nationalization. The only country which was careful to take timely precautions against being harmfully affected by the nationalization legislation of Bulgaria was the Soviet Union. The latter had made sure that the property it acquired would not become subject to nationalization. According to Article 24 of the Peace Treaty, and on the basis of domestic legislation expressly referring to this treaty, the Bulgarian Government recognized that the Soviet Union was entitled to all German assets in Bulgaria. As stated above, even before the signing of the Peace Treaty, the Bulgarian Government passed a special law on May 31, 1946, which transferred the German property in Bulgaria to the ownership of the U.S.S.R. Moreover, Soviet property, obtained by virtue of the above-mentioned law, was exempted from nationalization even before the signing of the Peace Treaty, as was done, for instance, by the Law on Government Insurance Agency, published only a month later, on June 27, 1946, which nationalized Bulgarian and foreign insurance companies as well, including those of United Nations nationals.

In fact, most of the major Bulgarian nationalization laws contain special provisions which expressly declare that only Soviet Union property can escape the effect of nationalization. A few examples will illustrate the statement: the Law on Nationalization of All Private Industrial and Mining enterprises of December 24, 1947,³⁵ which nationalized all Bulgarian and foreign enterprises, exempted Soviet property from nationalization (below, p. 489); the Law on Banking of December 27, 1947,³⁶ which nationalized all Bulgarian and foreign banks, had a similar provision (below, p. 490).

In connection with the question of the treatment of alien property in Bulgaria after the end of the war and especially after the signing of the Peace Treaty, mention should also be made of Article 29, paragraph 1 (c) of this treaty, which provided that, pending the conclusion of commercial treaties or agreements between individual Members of the United Nations

³⁵ DV No. 302, Dec. 27, 1947, Sec. 4.

³⁶ *Ibid.*, Sec. 3.

in Bulgaria, the Bulgarian Government should, during a period of transition from the coming into force of the treaty, grant on a reciprocal basis to United Nations nationals,³⁷ including juridical persons, nations and most-favored-nation treatment in all matters pertaining to commerce, industry, shipping and other forms of business activity on Bulgarian territory. As a matter of fact, most of the nationalization legislation in Bulgaria was passed during this period.

Finally, it must be pointed out here that according to Article 74 of the Peace Treaty between the Allied and Associated Powers and Italy of February 10, 1947,³⁸ reparations to the Soviet Union were to be taken also from Italian assets in Bulgaria.³⁹ However, the Bulgarian legislation and the Peace Treaty with Bulgaria provided (1) that only German assets were to be transferred to the ownership of the Soviet Union, and (2) that only Soviet property, formerly German property, was to be excluded from nationalization. In no legal text is it ever mentioned that Italian assets (1) were to be transferred to the ownership of the Soviet Union and that (2) they were to be exempted from nationalization. In other words, there was and is no international obligation on the part of the Bulgarian state, and there is no Bulgarian domestic legislation now in effect, which transferred Italian assets in Bulgaria to the Soviet Union. The Bulgarian Government only took measures to place under control certain Italian property (for instance, the Italian schools in Bulgaria) or later on to require the declaration of all Italian assets in Bulgaria (above, pp. 474 and 476).⁴⁰

4. In connection with the material discussed above, it must also be stressed that during the period of control over alien enemy property belonging both to the United Nations and to the Axis Powers, as well as after the lifting of this control, *all foreign property fell under the provisions of the laws and decrees introducing the regime of planned economy* (see below, Section III).

On the other hand, *this was the legal status of alien enemy property (mainly former German property) and non-enemy property (owned by United Nations nationals and peoples) in Bulgaria at the time when the Bulgarian Government introduced legislation of nationalization of property*.

³⁷ The explanation of the term "United Nations nationals" is given in Art. 32 of the Peace Treaty with Bulgaria.

³⁸ 2 A.J.I.L. Supp. 70 (1948).

³⁹ Kazimierz Grzybowski, "Foreign Investment and Political Control in Eastern Europe," 13 Journal of Central European Affairs 13 (1953).

⁴⁰ According to a publication in DV No. 209 of Sept. 11, 1949 (p. 1), the Italian Bulgarian Commercial Bank (an establishment of the Italian bank "Commercio Italiano") "ceased to exist independently" and the inscription was made in the commercial register at the Sofia District Court (upon decision No. 948 of the court of April 1, 1948) that, on the basis of Sec. 2 of the Law on Banking of 1947, "the assets and liabilities [of this bank] are transferred entirely and by law to the Bulgarian National Bank in Sofia." As explained below (subsec. F), all Bulgarian and foreign banks were nationalized and became government property with the exception of the property belonging to the Soviet Union.

industry and mines, banks, insurance, real property, tobacco, oil, etcetera (below, Section IV).

III. LEGISLATION OF PLANNED ECONOMY IN RELATION TO ALIENS

A. *Establishment of the Regime of Planned Economy*

Immediately after coming into power, the new Bulgarian Government passed several laws and decrees or amended old ones with the purpose of introducing a regime of planned economy. A short general survey of the legislation in this field reveals the following.

The principle of economic planning was proclaimed for the first time by the Law on the Supreme Economic Council of May 21, 1945,⁴¹ which provided for a special economic planning agency to organize and direct the basic branches of the national economy. Only a few months later, another law of the same type was enacted, entitled "Law on Supply and Prices," September 13, 1945.⁴² Along this line, with the task of serving the economic planning policy of the new government, the Law on Civil Mobilization, passed on May 4, 1940,⁴³ during World War II, was accordingly amended several times. The above-mentioned three legislative acts, however, were considered only as the groundwork laid for the adoption of measures which would establish the new economic order.

The major step toward the establishment of the regime of planned economy, thus taking a practical form, was made by the Law on Approval of a Two-Year Government Economic Plan, 1947-1948, of April 24, 1947.⁴⁴ Referring to this plan, the Chairman of the Supreme Economic Council, Dobri Terpeshev, said in a speech before the Grand National Assembly:

With this plan [Two-Year Economic Plan] the development of the Bulgarian national economy is for the first time put on principles of planning.⁴⁵

Several months later, the principle of planned economy became also a constitutional feature of the economic structure of Bulgaria. The Constitution of December 6, 1947,⁴⁶ provided in its Section 12, paragraph 1, that

The State shall direct through its government economic plan the government, co-operative and private economic activity.

Further, this Constitution created a special agency, the Government Planning Commission,⁴⁷ defined by the Regulation of January 17, 1948,⁴⁸ as the "supreme agency for the planning of the national economy."

⁴¹ DV No. 115; correction: DV No. 121, May 29, 1945; amended: DV No. 142, June 22, 1945; repealed: DV No. 50, March 2, 1948.

⁴² DV No. 213; amended several times; repealed: IPNS No. 13, Feb. 13, 1953.

⁴³ DV No. 100.

⁴⁴ DV No. 93.

⁴⁵ Dobri Terpeshev, *The Two-Year Economic Plan* (Sofia, Ministry of Information and Arts, Press Department, 1947), p. 5.

⁴⁶ DV No. 284.

⁴⁷ Sec. 39 of the Constitution.

⁴⁸ DV No. 12. The Regulation Concerning the Government Planning Commission was later superseded by the Regulation of the same title of May 1, 1953, IPNS No. 35.

On March 2, 1948,⁴⁹ the Law on Civil Mobilization of 1940 and the Law on the Supreme Economic Council of 1945 were repealed by the Law on Labor Economic Mobilization, which authorized the government to mobilize every citizen or his property for fulfillment of the government economic plan. Finally, on January 18, 1949,⁵⁰ the Law on the [First] Five-Year Government Economic Plan, 1949-1953, was adopted to serve as the legal basis of the planned economy. This law provided that the Council of Ministers should be the highest executive-directive agency in the field of economic planning.

The principle of government planned economy was carried out in practice more effectively after all means of production, credit, trade, transport, etcetera, *i.e.*, almost the entire national economy, was nationalized (see below, Section IV).

B. The Effects of Planned Economy upon Aliens and Alien Property

The regime of planned economy not only concerned Bulgarian nationals, but also directly affected the legal status of aliens in Bulgaria in regard to their labor, property, and the scope of their economic activity, and made the flow of foreign capital into the country impossible.

With the purpose of limiting the flow of foreign capital into the Bulgarian economy and controlling foreign participation in commercial and industrial enterprises, the new government, as early as April 27, 1945,⁵¹ passed a special law which provided that in the future foreign companies or local companies having predominant foreign capital might acquire property (including real property) or property rights to commercial, industrial and mining enterprises, or participate in such enterprises, only after receiving the permission of the Ministry of Finance and the Ministry of Commerce and Industry.

Parallel with this measure, the new political authority not only did not repeal but, on the contrary, greatly exploited the Law on Civil Mobilization of May 4, 1940,⁵² enacted by the former government during the war as a measure justified by the state of war. This law affected foreigners in Bulgaria, since, according to its Section 15, paragraph 2, "also foreign enterprises and nationals of both sexes [can be recruited], in the manner provided for Bulgarian citizens." On the basis of Bulgarian legislation in force at that time, the term "foreign enterprises" embraced mainly the local branches of foreign joint-stock companies or limited partnerships. The term "foreign nationals" was understood to embrace only persons who had a more permanent residence in Bulgaria as specified by the law on passports, border permits and police control over foreigners.

While the Law on Civil Mobilization was applied to foreign physical persons and their enterprises in concrete, individual cases or for the purpose of recruiting their labor and property, the Law on Supply and Prices of September 13, 1945,⁵³ placed under a general regime of regulation

⁴⁹ DV No. 50.

⁵⁰ DV No. 12.

⁵¹ DV No. 97.

⁵² DV No. 100.

⁵³ DV No. 213.

in the field of supply, distribution and prices all Bulgarian enterprises and firms with foreign capital, all local branches of foreign juridical entities carrying on economic activities for profit (such as joint-stock companies or limited partnerships), and all physical persons of foreign nationality engaged in the business of supply and distribution as well.

The Government Economic Plan for the Years 1947 and 1948, approved by a special law of April 24, 1947,⁵⁴ imposed upon foreigners and their enterprises in Bulgaria a series of new and important obligations. This law required complete compliance with the obligations by all persons directly or indirectly mentioned in Section 2 of this plan, regardless of their nationality, and accordingly affected the local branches of foreign companies and the physical persons of foreign nationality who were engaged in economic activities in Bulgaria. Also all local juridical persons having the character of profit organizations in which foreign nationals participated with their capital investments were placed in the same regime regardless of the percentage of the capital participation.

Craftsmen of foreign nationality were also obliged to fulfill all the obligations imposed by the plan in general, and were required to give an account of the raw and other materials received as well as of the finished products. In this connection, the Regulation Concerning the Guidance and Supervision of Industrial Production of May 12, 1947,⁵⁵ which introduced the obligation of giving an account regarding the fulfillment of the production plan, was also applied to foreigners and their enterprises.

In fulfillment of the Two-Year Government Economic Plan, the Council of Ministers was authorized at any time to place the labor of different categories of the population at the disposal of individual agencies and economic branches and to assign to them the exploitation and use of enterprises and movable property belonging to Bulgarian and foreign nationals alike. The general legal basis for this authority was provided by the Law on Labor Economic Mobilization of March 2, 1948,⁵⁶ which repealed the Law on Civil Mobilization of May 4, 1940, and the Law on the Supreme Economic Council of May 25, 1945.

The [First] Five-Year Government Economic Plan, 1949-1953, approved by the Law of January 18, 1949,⁵⁷ was exclusively based on the principle of a planned economy and was carried out in a national economy which was almost completely nationalized. Consequently, aliens were completely regimented under the new legal and economic order in regard to their labor, property and economic activities.

IV. NATIONALIZATION LAWS AND ALIEN PROPERTY

The Bulgarian Constitution of December 6, 1947, along with confirming the principle of government economic planning (Sec. 12, par. 1), paved the way for the nationalization of the national economy. The Constitution and subsequent legislation claimed and declared as government property,

⁵⁴ DV No. 93.

⁵⁵ DV No. 107.

⁵⁶ DV No. 50.

⁵⁷ DV No. 12.

and accordingly nationalized, all private industry, mines, and other underground natural wealth, forests, waters, sources of natural power, rail roads, air transport, post offices, telegraph and telephone communications, radio broadcasting facilities, banks, insurance companies cargo vessels, urban properties, motion picture theaters, printing and bookbinding establishments, landed estates (partially), commodity exchanges, etcetera.

In fact, the process of nationalization of individual economic branches began long before the adoption of the new Constitution.⁵⁸ For instance, the introduction of a government monopoly of tobacco led to the nationalization of all enterprises engaged in the respective economic branch; the same is true with land reform, insurance and others.

The legislative measures dealing with the nationalization of some of the most important branches of the national economy, especially those in which interests of foreign nationals were affected, are discussed separately below.

A. Trade (*Foreign and Domestic*)

The elimination of Bulgarian and foreign export-import enterprises, as well as foreign capital from the sector of foreign trade was achieved by the establishment of a government monopoly of foreign trade exercised by the Ministry of Foreign Trade, as in the Soviet Union. However, it must be pointed out here, that while the Soviet Union Constitution of 1936 expressly declares in its Article 14 that "foreign trade is based on government monopoly," in Bulgaria, to state it in the words of Petko Stainov professor of law at Sofia University, "the government monopoly of foreign trade was established on the basis of the legislation in effect taken in its entirety."⁵⁹ All this has been gradually achieved by virtue of a series of legislative enactments and administrative measures aimed at abolishing all private initiative and every private establishment engaged in foreign trade activity.

Prior to the adoption of the Constitution of 1947, a number of commercial firms and enterprises had been nationalized [confiscated] on the basis of laws and decrees largely penal in nature. The Regulation on Import and Export of October 26, 1946,⁶⁰ determined who could be exporters and importers.

The Constitution itself gave the government the authority "to nationalize fully or partially branches of industry, trade, transport and credit" and declared that "foreign and domestic trade shall be directed and controlled by the State."⁶² It also provided that

it may be introduced as the exclusive right [monopoly] of the State to produce and to trade with objects which are of essential importance for the national economy and for the needs of the people.⁶³

⁵⁸ Kutikov, *loc. cit.* 343.

⁵⁹ Petko Stainov, *Rukovodstvo po Administrativno pravo* [Manual of Administrative Law] (Sofia, Nauka i Izkustvo, 1950), p. 184.

⁶⁰ DV No. 246.

⁶¹ Sec. 10, par. 6.

⁶² Sec. 13, par. 1.

⁶³ *Ibid.*, par. 2.

In pursuance of these provisions a great number of laws have been passed nationalizing all insurance organizations and companies (Bulgarian and foreign);⁶⁴ all private industrial and mining enterprises,⁶⁵ all banks and other banking institutions (Bulgarian and foreign).⁶⁶ At the same time, all commodity exchanges have been closed;⁶⁷ several monopolies have been introduced⁶⁸ and all inventories of commercial enterprises have been purchased by the government.⁶⁹

The crucial step toward the establishment of a government monopoly, however, was taken by the Law of December 27, 1948,⁷⁰ which created a separate Ministry of Foreign Trade and empowered it "to exercise the foreign trade of the country." It is of interest to mention here a statement made in a legal article published in *Otechestven Front*⁷¹ of October 4, 1951:

The nationalization of the industry, the mines and the banks prepared the ground for the entire and full seizure of foreign trade, which in 1948 became a government monopoly. Exploitation by private capital in the field of foreign trade was completely abolished after 2,228 private capitalistic [commercial] firms for import and 883 firms for export had been liquidated.

This process of elimination of "the private sector of commerce," as it is called by the Bulgarian legal writers of today, came formally to an end when the Commercial Code of May 29, 1897,⁷² was repealed by the Law on Contracts and Obligations of November 22, 1950.⁷³ Indeed, some chapters of the Code dealing with commercial organizations, as well as the Law on Limited Partnerships of May 8, 1924,⁷⁴ remained in force until September 28, 1951,⁷⁵ when a special Edict was issued to discontinue their application. By virtue of this Edict every commercial enterprise was dissolved *ipso jure* after the lapse of three months. Their properties were declared government property. Only commercial enterprises having special licenses continued to exist. The Regulation Concerning the Liquidation of Commercial Organizations and Limited Partnerships of August

⁶⁴ Law on Government Insurance Agency, DV No. 143, June 27, 1946.

⁶⁵ Law to Nationalize All Private Industrial and Mining Enterprises, DV No. 302, Dec. 27, 1947.

⁶⁶ Law on Banking, *ibid.*

⁶⁷ Law on Closing the Commodity Exchanges, DV No. 305, Dec. 31, 1947.

⁶⁸ Law on Government Monopoly of Tobacco, DV No. 96, April 28, 1947; Law on Government Monopoly of Spirits, DV No. 178, Aug. 4, 1947; Law on Government Monopoly of Oil Products, DV No. 55, March 9, 1948, and others.

⁶⁹ Law to Purchase All Inventories of Commercial Establishments, DV No. 294, Dec. 15, 1948.

⁷⁰ DV No. 279.

⁷¹ *Otechestven Front* (Sofia) daily, organ of the National Council of the Fatherland Front and the Presidium of the National Assembly.

⁷² DV No. 114, as amended several times.

⁷³ DV No. 275.

⁷⁴ DV No. 288.

⁷⁵ IPNS No. 78. This Edict was amended on April 10, 1953 (IPNS No. 29).

8, 1953,⁶⁶ "annulled" all stocks issued by the joint-stock companies in the country prior to September 9, 1944.⁶⁷

Parallel with the dissolution of all trading organizations engaged in foreign trade, all commercial representatives of private foreign firms operating in Bulgaria were eliminated. Again, on January 14, 1955,⁶⁸ the Ministry of Foreign Trade issued an ordinance which prohibited private persons residing in Bulgaria as well as local juridical persons from entering or negotiating the conclusion of foreign trade transactions, or representing foreign firms in Bulgaria.

The elimination of foreign capital and activity in the economic sector of domestic trade was achieved after the domestic trade was taken over by the government and by co-operative and mixed government-co-operative commercial centers and enterprises. Private initiative is now permitted only in retail trade on a very small scale; it represents only 3 percent of the entire economic life in this sector. The restriction of private participation in the field of domestic trade was carried out by the introduction of several government monopolies, for instance, the monopolies on trade in wheat, rye, corn, etcetera;⁶⁹ tobacco (Law of April 28, 1947);⁷⁰ spirits (Law of August 4, 1947);⁷¹ oil products (Law of March 9, 1948),⁷² and many others. All these measures affected not only Bulgarian nationals but also aliens and their property, rights and interests, which were accordingly expropriated and nationalized.

B. Tobacco

By virtue of a number of legislative acts issued since 1945, dealing with the temporary regulation of the purchase of tobacco by the government, the Bulgarian Agricultural and Co-operative Bank and the Union of Tobacco Co-operatives in Bulgaria have been authorized to organize and carry out the purchase and manufacture of the entire tobacco crop at the risk and for the account of the government.⁷³ Indeed, on the basis of these Acts, the above-mentioned agencies expropriated the equipment and machinery of Bulgarian and foreign firms and enterprises engaged in the manufacture of and trade in tobacco and tobacco products. These measures, however, were considered as the first step toward monopolizing this field of economic activity on a factual basis.

Formally, the government monopoly of tobacco, *i.e.*, the right of the government to purchase the tobacco crop, to manufacture and trade with raw tobacco leaves as well as to manufacture and trade with finished tobacco

⁶⁶ IPNS No. 66.

⁶⁷ This regulation was issued on grounds of Edict of April 10, 1953 (IPNS No. 96), which annulled the Edict of Sept. 28, 1951 (IPNS No. 78).

⁶⁸ IPNS No. 4.

⁶⁹ Kutikov, *loc cit.* 338.

⁷⁰ DV No. 96.

⁷¹ DV No. 178.

⁷² DV No. 55.

⁷³ Laws on Temporary Regulation of the Question as to the Purchase of Tobacco: Crop—1944 (DV No. 54, March 8, 1945); Crop—1945 (DV No. 59, March 14, 1946); Crop—1946 (DV No. 58, March 13, 1947).

bacco products, was declared by the Law of April 28, 1947.⁸⁴ Section 25 of this law required that, within 30 days from its publication, owners or persons representing them declare as of January 1, 1944, all movable and immovable property connected with the tobacco industry for the purpose of its expropriation. The expropriation was made upon the decision of the Council of Ministers and was not subject to appeal and became effective with its publication in the official law gazette. As a result, every private initiative and economic activity in the manufacture and trade of tobacco products was abolished and all Bulgarian and foreign enterprises were expropriated.

The expropriation of real property connected with the tobacco industry was carried out in two ways: (a) on the basis of the Law on Expropriation of Immovable Property for State and Public Use of February 23, 1885, as amended⁸⁵ (Section 27, paragraphs 1-5), or (b) (as an exception), on the basis of mutual agreement between the government and the party concerned (Remark to Section 27). The movable property of the nationalized enterprises was subject to compulsory purchase by the government. These measures affected all tobacco enterprises regardless of their foreign element: the foreign nationality of a single proprietor; the foreign nationality of a company; or the participation of foreign capital in a local single-man firm or local company.

After an estimation of the value of the nationalized property, the final amount was to be reduced by a proportionately increasing percentage (up to 50 percent) in favor of the government monopoly of tobacco (Section 31). Compensation in cash was promised for the first 1,000,000 *leva* and for the rest in government bonds which began to bear 3 percent interest after January 1, 1950, and are payable in 20 years. Government and municipal taxes are to be deducted from each payment. Undeclared movable and immovable property was confiscated and its owner was subject to criminal prosecution.

The original law on government monopoly of tobacco was amended a year later by an Edict of April 22, 1948,⁸⁶ which provides that the amount of compensation for nationalized real property shall be determined according to the Law on Nationalization of Private Industrial and Mining Enterprises of December 24, 1947 (below, subsection E). Compensation shall be paid in interest-bearing government bonds, *i.e.*, no cash payments shall be made, and in this connection Sections 13 and 14 of this law shall be applied. The same is true with movable property, *i.e.*, compensation is promised according to the revised provision of Section 28. Further, this amendment provides that the evaluation of the property shall not be subject to approval by the Ministry of Finance and that all these changes in the original law will have a retroactive effect.

⁸⁴ DV No. 96; amended: DV No. 93, April 22, 1948; DV No. 234, Oct. 6, 1948; IPNS No. 41, May 22, 1951; IPNS No. 39, May 10, 1952.

⁸⁵ DV No. 18; this law was superseded by the Law on Government Property of Dec. 22, 1948, DV No. 300.

⁸⁶ DV No. 93.

C. Oil

The Law on Government Monopoly of Oil Products of March 9, 1948, created a government economic enterprise called "Petrol" with the exclusive right to import and trade in oil products.⁸⁸ Owners and keepers of houses as well as of movable and immovable property connected with import, trade and transportation of oil products were obliged to declare the property within 30 days from the publication of this law for the purpose of its expropriation.

The law provided for only one form of expropriation: that for payment. The decisions were taken by the Council of Ministers and were subject to appeal.

Compensation consisted of government interest-bearing bonds; the amount of the compensation and the manner of its payment were to be determined according to the provisions of the Law on Nationalization of Private Industrial and Mining Enterprises of December 24, 1947 (art. 10, subsection E). Undeclared property was confiscated; in cases of deliberate omission to declare property, the owners of such property were criminally prosecuted.

Foreign single-man firms and enterprises, joint-stock companies and limited partnerships, as well as foreign capital investments in local enterprises, were also declared government property. However, foreign property which came into the ownership of the Soviet Union under the provisions of Article 24 of the Peace Treaty with Bulgaria was exempt from expropriation.⁸⁹

D. Insurance

The Law on the Government Insurance Agency of June 27, 1946, declared the insurance business to be the exclusive activity of the government; as a result, every private organization in this field was expropriated and eliminated.

This law provides in Section 10 that the Government Insurance Agency shall repay the shareholders of insurance companies, both Bulgarian and foreign, the value of their shares. However, this law expressly states in Section 11 that all companies, associations, funds and mutual benefit associations, their members and employees, as well as the persons insured by them, "cannot claim any compensation whatsoever from the Bulgarian State or from the Government Insurance Agency" regardless of whether owned or claimed by Bulgarian nationals or aliens.

⁸⁸ DV No. 55. Ordinance Concerning Application of Sections 6, 12 and 13 of this law, DV No. 65, March 20, 1948; Ordinance Concerning Application of Sections 6, 12 and 19 of this law, DV No. 252, Oct. 27, 1948; Regulation for Application of this law, DV No. 152, July 5, 1949.

⁸⁹ As regards the mining and industrial enterprises of oil and oil products, see Section 1: Industry and Mining.

⁹⁰ Kut'kov, *loc. cit.* 342.

⁹¹ DV No. 143. This law was amended by the Edict of Aug. 17, 1950, DV No. 49. The Statute of the Government Insurance Agency was published on Dec. 30, 1952, IPN No. 147.

While Section 6 of this law expressly declares that not only Bulgarian but also all foreign insurance companies or their branches in Bulgaria, as well as foreign capital investments in Bulgarian insurance organizations, shall be subject to nationalization, a special clause of this provision exempts from nationalization only those companies and investments which come under the Law to Transfer German Property to Ownership of the U.S.S.R. of May 31, 1946.⁹¹

E. Industry and Mines

The Constitution of December 6, 1947, prescribed in Section 10, paragraph 6, the nationalization of industry and mines. This was put into effect by the Law on Nationalization of All Private Industrial and Mining Enterprises of December 24, 1947.⁹² Moreover, all buildings, warehouses, machines, equipment, transportation conveyances, farms, draught animals and livestock, dwelling houses and the like, which were considered to be the enterprises' appurtenances, were subject to nationalization "wherever they may be found" (Sec. 6). The latter clause indicated the extraterritorial effect of this law.

The assets of the nationalized enterprises were taken over by the government, as well as all deposits, credit balances, securities and other valuables deposited in any bank in the name of the former owners, unless they could prove that they were obtained "through personal toil" or were derived from sources not connected with the enterprises. Patents, designs, trademarks and mining rights were likewise taken over by the government. The government assumed the liabilities of the nationalized enterprise only to the extent of the assets taken over, and even then certain liabilities, for example, those arising from transactions "outside the scope of activity of the enterprise," a vague and undefined term, were excluded.

According to Section 13 of this law, the former owners of nationalized enterprises were to receive from the government "an indemnity in interest-bearing government bonds calculated on the assessment of the enterprise under the Law on Capital Levy [Law on Single Taxation of Property] of April 8, 1947,⁹³ diminished by a proportionately increasing percentage," going up to 70 percent. In exceptional cases, however, the amount of compensation could be determined by agreement, "if so required by the interests of the country," and the whole or a part could be paid in cash. Moreover, certain classes of property-owners, Bulgarian and foreign, were refused compensation by Section 14 of this law. No compensation was granted to persons who were considered to have served or helped the enemies of the present political regime.

This law declared the entire industry of the country to be government

⁹¹ DV No. 120, Supp.

⁹² This law was published on Dec. 27, 1947 (DV No. 302), but it came into effect on the day of its approval by the Grand National Assembly (Dec. 24, 1947), as announced over the radio (see Sec. 24 of this law). Regulation Concerning the Implementation of this law was published in DV No. 39, Feb. 18, 1948.

⁹³ DV No. 80; amended: DV No. 146, June 27, 1947.

property regardless of the nationality of the owners. However, its Section 4 provided for the following exemption:

Section 4. The present law shall not apply to enterprises which are the property of foreign governments and fall under the provisions of Article 24 of the Peace Treaty with Bulgaria of February 10, 1947.

Thus, only property belonging to the Soviet Union escaped the effect of nationalization. Moreover, although the Bulgarian Government pretended to eliminate foreign participation in the exploitation of Bulgarian mines, a law was passed, as early as March 28, 1946,⁹¹ for the establishment of a Soviet-Bulgarian Mining Company.⁹²

The amendment to this law of August 2, 1949,⁹³ provided that enterprises other than those enumerated in the list attached to the original law could also be nationalized, as well as every economic activity which was considered as connected with the nationalized enterprise. Further, this amendment declared that from the "liabilities" of the nationalized enterprises the government should take over, up to the extent of the assets, "only those which are due to the government, the co-operatives, the public organizations, the offices and the working people."

F. Banks

The Law on Banking of December 27, 1947,⁹⁴ provided for the nationalization of the entire banking system in the country.⁹⁵ Under Section 1, all banking activities and operations became the exclusive monopoly of the government and were to be exercised solely by the Bulgarian National Bank and (with respect to long-term investments and credits) by the Bulgarian Investment Bank. All other banks,⁹⁶ Bulgarian and foreign, ceased their independent existence and their assets and liabilities were transferred to the government banks.

As to the question of compensation, Section 4 of this law made some

⁹¹ DV No. 71.

⁹² This company was dissolved on Oct. 9, 1954, according to an announcement in the Bulgarian press (*Otechestven Front*, Oct. 13, 1954).

⁹³ DV No. 176.

⁹⁴ DV No. 302.

⁹⁵ "On the eve of nationalization, the country had in all 627 banking establishments worth mentioning. The National Bank and 99 local establishments; the Agricultural and Cooperative Bank—175; Bulgarian Credit—33; Popular Banks—225; private banks—66. To this we must add 1,032 branches of the Postal Savings Bank and 2,952 agricultural cooperative-credit establishments which for the time being have a limited activity. There is therefore in the whole country a total of 4,511 banking establishments," according to a statement of Prof. Ivan Stefanov, former Minister of Finance, which appeared in "Nationalization of Industry and Banks in Bulgaria" (Sofia, Ministry of Foreign Affairs, Press Department, 1948), p. 27.

⁹⁶ There were 5 larger private banks worth mentioning: Bulgarian Commercial Bank, which had French capital from the group Banque de Paris & des Pays-Bas was participating Italian & Bulgarian Commercial Bank, establishment of the Italian bank "Commerciale"; Prague Credit Bank's branch in Bulgaria; Macedonian National Bank; Bulgarian Discount Bank. *Ibid.*, p. 25.

provision for the rights of former shareholders in the nationalized banks, although these rights were to lapse after one year if they had not been exercised during that period. The nominal value of the shares belonging to every individual shareholder was diminished by a proportionately increasing percentage in favor of the two government banks. Shares in the nationalized banks owned by Bulgarian nationals were to be paid for, at most, at their nominal value. The first 100,000 *leva* were to be paid in cash and the remainder in bonds, carrying 3 percent interest as of January 1, 1949, issued by the Bulgarian National Bank or the Bulgarian Investment Bank and payable in 20 years. Foreign national shareholders were to be paid "according to mutual agreements."¹⁰⁰

Although the Bulgarian National Bank took over all the rights formerly possessed by the nationalized banks, the former shareholders remained liable for obligations incurred by the banks before they were nationalized. From every payment of indemnity the due government and municipal taxes were to be deducted. Again, certain classes of property-owners were refused compensation on the grounds of having served or helped the enemies of the present political regime.

The law under discussion, however, did not apply to banks which were foreign government property and became Soviet property as a result of Article 24 of the Peace Treaty with Bulgaria.¹⁰¹ Section 3 of this law provided as follows:

Section 3. The present law shall not apply to banks which are the property of foreign governments and fall under the provisions of Article 24 of the Peace Treaty with Bulgaria of February 10, 1947.

G. Real Property (in Town)

The Law to Expropriate All Sizable Urban Property of April 15, 1948,¹⁰² declared as government-owned real property in towns¹⁰³ which is not required by the owners, but is used for the "acquisition of income," *i.e.*, as an investment.

Expropriation was carried out by a commission whose decisions entered into force after the Council of Ministers had approved the report submitted by the Minister of Justice. The Regulation for the Application of this law of April 15, 1948,¹⁰⁴ specifically provided that no legal defense was to be allowed before this Commission.¹⁰⁵

The Law and the Regulation both provided for the payment of com-

¹⁰⁰ For instance, the agreement between the Bulgarian Government and Banque de Paris & des Pays-Bas, branch de Genève, concerning its capital in the nationalized French-Bulgarian Commercial Bank in Sofia (DV No. 256, Nov. 4, 1947).

¹⁰¹ For instance, the former German Credit Bank is now the property of the Soviet Union under Art. 24 of the Peace Treaty.

¹⁰² DV No. 87; correction: DV No. 91, April 20, 1948.

¹⁰³ After 1934, foreigners were denied the right to possess real property in the village communes. Therefore, the land reform, which greatly affected landowners in the villages, is not subject to discussion here.

¹⁰⁴ DV No. 87.

¹⁰⁵ Sec. 44 of the Regulation.

penation: the owners of expropriated real property in towns were to be paid an indemnity in interest-bearing government bonds. The indemnity was calculated on the basis of the Law on the Capital Levy [Single Taxation of Property] of April 8, 1947,¹⁰⁶ but the amount payable was to be reduced by a progressively increasing percentage, going up to 70 percent. In determining the amount of the compensation all taxes paid by the former owner were to be deducted. The Regulation specified that the indemnity would not be payable until it had been proved that all government and municipal taxes had been paid. The compensation could also be made on the basis of mutual agreement "only when this is in the interest of the country." It was left up to the government to decide which method of expropriation was to be taken. Section 16 of this law prohibited payment of compensation to persons who had served or helped the enemies of the present political regime. The text is the same as that of Section 14 of the Law on Nationalization of Industry (above, page 488).

While the basic law was silent regarding the expropriation of real property in towns, the Regulation for its application expressly specified that the law should also affect foreign nationals.¹⁰⁷ Again, foreign government property (i.e., Soviet property which formerly belonged to the German Government and its nationals, thus falling under Article 24 of the Peace Treaty with Bulgaria), as well as property belonging to other foreign governments,¹⁰⁸ was exempted from expropriation. However, this exception with regard to "property belonging to other governments" was later canceled by Edict of July 13, 1951,¹⁰⁹ so that only Soviet property remained untouched.

V. THE PROBLEM OF INDEMNIFICATION

The characteristic features of the entire expropriatory legislation, as discussed above, with respect to the questions of compensation will be given below in the form of a summary.

As a general rule, expropriations were made upon a decision of the Council of Ministers or a single Ministry. Such a decision was not subject to appeal and no legal defense was allowed; it became effective as of its publication in the official law gazette.

Two methods were used to establish the amount of compensation. One method was an estimation by the administrative authority of the value of the expropriated property or valuables. The amount thus fixed was always reduced by a proportionately increasing percentage, going in certain cases up to 70 percent, "in favor of the Government." For instance, according to the Law on Banking of 1947, from the value of the shares belonging to every individual shareholder the following deductions were to be made in favor of the Bulgarian National Bank or the Bulgarian

¹⁰⁶ DV No. 80 as amended.

¹⁰⁸ Sec. 70 of the Regulation.

¹⁰⁷ Sec. 69 of the Regulation.

¹⁰⁹ IPNS No. 56.

Investment Bank:

for the part from 500,001 leva to 10,000,000 leva—	10%
for the part from 10,000,001 leva to 20,000,000 leva—	15%
for the part from 20,000,001 leva to 30,000,000 leva—	20%
for the part from 30,000,001 leva to 40,000,000 leva—	30%
for the part from 40,000,001 leva to 50,000,000 leva—	40%
for the part from 50,000,001 leva and above	—50% ¹¹⁰

Or, according to the Regulation for the Implementation of the Law to Expropriate Real Property in Towns of April 15, 1948, the Ministry of Finance was to issue bonds to the former owners in an amount equal to the value of the property decreased by a proportionately increasing percentage as shown in the following table:

for the part up to 1,000,000 leva	—10%
for the part from 1,000,001 leva to 5,000,000 leva—	15%
for the part from 5,000,001 leva to 10,000,000 leva—	20%
for the part from 10,000,001 leva to 20,000,000 leva—	30%
for the part from 20,000,001 leva to 30,000,000 leva—	40%
for the part from 30,000,001 leva to 50,000,000 leva—	50%
for the part from 50,000,001 leva to 100,000,000 leva—	60%
for the part from 100,000,001 leva and above	—70% ¹¹¹

In other words, the language of these provisions always indicated that the principle of less than full compensation was written into the expropriatory laws themselves.

The other method for determining the amount of compensation was by mutual agreement between the Bulgarian Government and the party concerned, "only when this is in the interest of the country." The decision as to which method was to be adopted was left to the government.

In the case of the nationalization of banks, the second method was the only one prescribed by law for the compensation of shareholders of foreign nationality. An example of this method of establishing the amount of compensation is the decision of the Bulgarian Grand National Assembly to approve the agreement of October 14, 1947, between the Bulgarian Government and the *Banque de Paris et des Pays-Bas, branch de Genève*, concerning its capital in the nationalized French-Bulgarian Commercial Bank in Sofia.¹¹²

It should be pointed out here that in the case of the nationalization of insurance companies, certain persons were refused any compensation at all.

Ivan Dermendzhiev, a present-day legal writer, made the following statement which clearly reflects the policy of the present government with respect to the payment of compensation:

¹¹⁰ Sec. 4, par. 3, of this law.

¹¹¹ Sec. 54 of this Regulation. Sec. 66 of the Regulation Concerning the Implementation of the Law on Nationalization of Industry of Feb. 18, 1948, DV No. 39, has the same text.

¹¹² DV No. 256, Nov. 4, 1947.

... our legislation, as far as its accepts the principle of expropriation, deviates from the above discussed view according to which nationalization of the means of production is to be done without any compensation. At the same time, however, it must be pointed out that our system of expropriation ... is to be distinguished also from the other view of timely, adequate and full compensation. It is receiving the principle of a permissible compensation (*razumno obshchetsenno*).¹¹³

Most of the laws and regulations expressly required that all government and municipal taxes be paid. Some of these acts specified that indemnification would not be payable until payment of the taxes had been proved.

As to the liabilities of the expropriated property and shares, the government assumed these only to the extent of the value of the property or share, or, as was usually specified, for instance, in the case of the expropriation of industry and mines, the government assumed only "taxes [liabilities] due to the government, the cooperatives, the public organizations, the offices and the working people." In the case of the nationalization of the banks, the former shareholders remained liable for obligations incurred by the banks which were nationalized.

As a rule, property not declared for expropriation and nationalization was confiscated and various penalties were imposed upon the former owners.

The principal method of paying compensation was for the government to promise the former owners that they would receive indemnity in interest-bearing government bonds, usually 3 percent bonds payable in 20 years. Again, "as an exception, when this is in the interest of the country," the government could promise to pay certain compensation "in cash." For instance, in the case of the nationalization of the banks, payments in cash were promised only for the first 100,000 *leva*, the rest to be in bonds; in the case of the expropriation of the tobacco industry, payments in cash of the first 1,000,000 *leva* were promised, but later this was changed to payments in bonds.

It must be emphasized here that the compensation was certainly ineffective, particularly when the compensation was reduced by a subsequent devaluation, as was the case with the currency reform of May 10, 1952,¹¹⁴ which revaluated the obligations. In other words, under the expropriation legislation, payments were promised in Bulgarian currency or in long-term bonds redeemable in Bulgarian currency which in the nationalized country was almost totally blocked. As a result, this payment in local blocked currency did not constitute "effective" compensation, since the Bulgarian nationalized economy did not permit private reinvestment in the country and, accordingly, local currency was of no practical utility to a foreign national.

¹¹³ Ivan Dermendzhiev, "Prinuditelno izzemvane na dvizhimi veshti za obshchestven polza," in Yearbook [Godishnik] of the Sofia University Law School, Vol. 43 (1947/48), No. 8, p. 107.

¹¹⁴ IPNS No. 40, May 11, 1952.

The recognition of the right to compensation for expropriated property was and is dependent, both by legal provisions and in practice, on political forces and not on purely judicial considerations. For instance, Section 14 of the Law on Nationalization of Industry,¹¹⁵ or Section 16 of the Law to Expropriate Real Property in Towns, provided that no compensation was to be granted to persons who were considered "to have served or helped" the enemies of the present political regime.

The following may be stressed here by way of conclusion: Alien property in postwar Bulgaria was not expropriated in accordance with due process of law, with payment of just compensation in an effectively realizable form and without unnecessary delay. In other words, aliens have not been given prompt, adequate and just compensation for their expropriated property and rights.

Nationals of the United Nations have not been protected by the Peace Treaty with Bulgaria of 1947 in respect to the expropriation measures taken by the Bulgarian Government. Only Soviet Union property in Bulgaria was exempt from any expropriation. The only legislative enactment which protected the property of other foreign governments was the Law of 1948 concerning the Expropriation of Real Property in Towns, which first excluded from expropriation the property of the Soviet Union as well as that of "other [foreign] governments." The latter clause, however, was canceled in 1951.¹¹⁶

Bulgarian jurists of today state that the principle of national treatment of foreigners was upheld by the Bulgarian nationalization and expropriation laws.¹¹⁷ Nevertheless, there is no doubt that the Bulgarian expropriatory legislation was more unfavorable to foreign than to Bulgarian property-owners.

Bulgarian postwar expropriatory legislative enactments were based on the principle of the extraterritorial effect of Bulgarian law. This was even expressly declared by some of the laws and decrees; for instance, Section 6 of the Law on Nationalization of Industry, or Section 49 of the Law on Banking. This is also the unanimous opinion of the Bulgarian jurists of today.¹¹⁸

¹¹⁵ Art. 14 reads as follows:

"No compensation is granted to owners of nationalized enterprises who have actively served or helped:

(a) the German state, the German Army or its units during the last World War, or the fascist Italian state, its Army or army units until the day of the capitulation of Italy to the United Nations;

(b) the Bulgarian fascist police, gendarmerie or Army against the fighters against fascism and their organizations in the period from March 1, 1941 to the end of 1944;

(c) foreign agents and spies and persons incriminated for activity aiming at the restoration of the fascist dictatorship in the period from September 9, 1944 to the day this law comes into effect;

The deprivation of compensation is decided by the Council of Ministers on report of the Minister of Industry and Handicrafts giving its reasons."

¹¹⁶ IPNS No. 56, July 13, 1951.

¹¹⁷ Kutikov, *loc. cit.* 350.

¹¹⁸ Kutikov, *loc. cit.* 357.

EDITORIAL COMMENT

COMMERCIAL DISCRIMINATION AND INTERNATIONAL LAW

The state traders of Eastern Europe are arguing that the principle of equality of states enshrined in the United Nations Charter must be extended to international commercial intercourse to prevent discrimination. This was the theme of the opening session of a recent conference of state traders, convened in Rome to consider the impact of state trading upon the governing commercial relations of states.¹

The issue had been raised by a paper submitted from the American side² arguing that since state trading made possible the purchase of goods by state-trading enterprises without thought for such tariffs as might have been established by the state traders themselves for accounting reasons or to tax the parcel-post trade, the traditional most-favored-nation clause has lost its principal value to private merchants seeking to do business in state-trading markets. The clause cannot operate to encourage expansion of trade by opening markets on a non-discriminatory basis to lowest price buyers because factors other than cost and tariffs influence the decisions of state-trading buyers. In short, the most-favored-nation clause has proved itself to be no longer a sufficient desideratum for private-enterprise states in their commercial relations with state-trading states to constitute a *quid pro quo* for important tariff concessions by private-enterprise states.

In opposition to the view that the standard most-favored-nation clause has lost its traditional value, it was argued by the state traders at Rome that the clause is the juridical expression in the field of trade of the principle of sovereign equality expressed in Article 2 of the United Nations Charter. Further, it was claimed that the clause is the logical extension of the Charter's Article 1 calling for the development of friendly relations based on respect for the principles of equal rights. To the state traders, the clause has value not because it has been traditionally an instrument through which trade has been expanded, but rather because it lays emphasis upon equal treatment, and from equality friendly relations are expected to flow. It becomes in state traders' eyes a contributing factor

The conference was held under the auspices of the International Association of Legal Science under contract with U.N.E.S.C.O., Feb. 24-March 1, 1958. Carl Schelström (Sweden) presided, and Harold J. Berman (U. S. A.) was general secretary. Participants were Tullio Ascarelli (Italy), Rudolph Bystricky (Czechoslovakia), Alexander Goldstajn (Yugoslavia), Richard N. Gardner and John N. Hazard (U. S. A.), Trajan Ionascu (Rumania), Feder Kalinychev (U.S.S.R.), Clive M. Schmitthoff and S. J. Lipstein (U. K.), Henryk Trammer (Poland), André Tunc (France), Leon Stojiliv (Bulgaria), Paul L. VanReepingen (Belgium), Mario Mattenei (Italian School Institute for the Unification of Private Law), André Bertrand and Stanislas (U.N.E.S.C.O.).

For a summary of the paper, see Martin Domke and John N. Hazard, "State Trading and the Most-Favored-Nation Clause," 52 A.J.I.L. 55 (1958).

to the cause of peace. State traders declare that acceptance of the clause should not be considered a national sacrifice to the state-trading countries, for it contributes to the peaceful conditions essential to flourishing trade.

The value of the most favored-nation-clause even between private-enterprise states was challenged by the state traders in their argument, for they claimed that tariff concessions between such states are made for a *quid pro quo* only to the principal producers of commodities. When such concessions are extended by operation of the clause to other states, it is only with regard to small quantities of marginal-producing states, and trade is expanded only to a small degree. Further the quota restrictions adopted in recent years in much of the world have prevented unhampered operation of the clause.

To explain retention of the clause even in relations between state-trading states in Eastern Europe and Asia in the face of derogatory remarks about its value in expanding trade in its traditional manner, the state traders declared that it was needed to carry into commercial relations of these states the principle of equal treatment which was fundamental to their relationships. The clause appears, therefore, not because of any value it may have had at one time in causing a general reduction of tariffs, but primarily because of its function politically in providing emphasis to the principle of equality of states. Its presence was said to avoid international ill will spawned by tensions evolving from unequal treatment. The state traders did not claim perfection for the clause in its traditional form, but they thought supplementation rather than replacement was called for to eliminate the bad practices.

The Western scholars rose to question the defense of the clause by the state traders. A British scholar asked whether the view expressed did not suggest that a country refusing to grant most-favored-nation treatment was committing a wrong. Such a position, if it were taken, could be questioned, for it was not yet established that most-favored-nation treatment had become merely a reflection of a new standard in customary international law. In reply to this criticism the spokesman for the state traders agreed that he could not demand the granting of most-favored-nation treatment as an international duty, but when it was granted, it was a correct implementation of a principle now enshrined in the United Nations Charter.

A second British scholar held that there are countries not bound by most-favored-nation clauses, yet this does not signify inequality of the participants, for sovereign status is not necessarily tied up with the presence of a most-favored-nation clause in a commercial treaty. To this scholar the clause did not bring in issue equal treatment of states, but it was mainly a device to protect traders, whether private-enterprise firms or state-trading enterprises, and the essence of most-favored-nation treatment is really in the private sphere and without relation to the public-law problem of equality of states. To this comment the state-trading spokesman replied that discrimination against traders in the absence of the clause may affect negatively the relations between states, and in conse-

that the most-favored-nation clause promotes in an indirect way relations between states, and it has a public-law feature.

An Italian scholar thought that the most-favored-nation clause should come to have a wider content than the reduction of tariffs or the statement of the principle of equality. It can be made to protect a state against discrimination in shipping or access to courts. It is in these spheres which have become subject to increasing discrimination with the centralization of power over the economy of states that the clause now can be useful. Yet, in some European countries the clause has traditionally been limited to applicability to tariffs. If a new function is to be developed for that function should be expressly stated. This would preserve the substance of the clause, although its form would be changed.

From the discussions in Rome it has become clear that the most-favored-nation clause still has vitality for the state-trading states. They want to include it in their treaties among themselves and with private-enterprise states. In spite of what they have said, the clause obviously benefits them in its traditional manner when they offer goods for sale in open markets, for its application causes tariffs against their products to be reduced to the level of favored private-enterprise trading partners. They can sell iron, manganese, glass, coal and essence of roses in an international market free of discrimination against them. It also contributes intangibly to their prestige, and it was evident that they value being treated as equals because of its prestige value. In their relations among themselves the clause has vital political importance. Perhaps this is because there lingers in Eastern Europe a feeling that Russians, because of their numbers and superior power, seek to dominate their partners. Under such circumstances it becomes of value to the smaller countries to have on record every possible statement of equality with the U.S.S.R., and it is of value to Soviet politicians to restate the principle of non-discrimination to assist them in the continual struggle to retain allegiance to the Soviet Union. It is only of secondary importance that sophisticated Eastern European intellectual intellectuals understand that statements of principle can be no bulwark against intervention when vital interests of the largest partner are at stake.

For the private-enterprise states, whether in their traditional form or as modified in their structure by nationalization of commanding heights in the economy, the most-favored-nation clause has lost its usefulness as a means of assuring sales in a state-trading market when the price is right. It was recognized at Rome that incorporation of the clause in a commercial treaty between state-trading and private-enterprise states may contribute to good will and friendly relations, and such a contribution is not without importance, but the value of the clause has been reduced to that of generalization. It can no longer be a direct *quid pro quo* for the granting by private-enterprise states of most-favored-nation treatment to a state-trading state, for no direct monetary benefits resulting from increased sales can be expected to flow from the grant by a state-trading state. Its value at most may lie in assuring to the private-enterprise state a basis for complaint if its merchants are not permitted to enter the state-trading state

to exhibit their wares, to plead their cases in court or to import their goods in their own vessels without discriminatory port duties or regulations.

Yet, benefits of a character not related to tariffs are not necessarily held to be inherent in a most-favored-nation clause. In several legal systems they must be enumerated to be claimed. It was a general feeling among the scholars from private-enterprise states that to assure protection on the highly practical matters of entry, access to courts, and shipping, the most-favored-nation clause should be redrafted from its generalized form to include specific reference to the matters on which equality of treatment is desired.

Draftsmen of future commercial treaties between state-trading and private-enterprise states will be wise, if the Rome deliberations represent sound thinking, to appreciate that the most-favored-nation clause should not be granted lightly with the feeling that it will facilitate in a state-trading market the expansion of trade which has usually flowed from non-discrimination in a private-enterprise market and that it is not, therefore, a true *quid pro quo* for a grant of the clause by a private-enterprise state to a state-trading partner. Further, it should be redrafted to include specifically the points on which equal treatment in entry, access to courts, shipping and perhaps other matters may ultimately be desired so that it amounts to more than a generalization. It must be in a form capable of serving as the foundation for a diplomatic protest should the occasion require. Such specification is not to imply that unfriendly discrimination can be expected from the hands of state traders. It is but the application of the rule of prudence required of a lawyer called upon to anticipate the quarrels which history indicates can arise even in relationships which start on the friendliest of terms.

JOHN N. HAZARD

ON SAVING INTERNATIONAL LAW FROM ITS FRIENDS¹

As Thurman Arnold pointed out some years ago in *Symbols of Government*, those who attack either men or institutions on counts of irrationality or ineffectiveness are immediately met by the rejection-reactions of those attacked. For some centuries now international law has been on guard against its overt attackers. Whether international law has been able adequately to deal with all its detractors² remains somewhat in doubt, but

¹ The writer owes this title to George Ward Stocking, thought to be the author of an article called "On Saving the Sherman Act from its Friends." However, Dr. Stocking sets the record straight in this way: He took the title for his presidential address to the Southern Economic Association, "Saving Free Enterprise from its Friends," 19 Southern Economic Journal, No. 4 (April, 1953), from an earlier paper of Thomas E. Sunderland, General Counsel of the Standard Oil Co. of Indiana, "Saving the Sherman Act from Its 'Friends,'" 1950 Institute on Antitrust Laws and Price Regulations, Southwestern Legal Foundation 211-224.

² Including certain notable stylists and otherwise persuasive writers, who have the notion that there is an essential disutility to national interest to be found in international law. The classification of notable stylist Dean Acheson in this regard, in

of active resistance and vigilance from the system's spokesmen there can be no doubt.

As every woman and Dale Carnegie know, men and their institutions are also susceptible to the flattery of implied reliance and effectiveness. It is natural that compliments to the reasonableness, completeness and effectiveness of an international legal order be accepted with gratitude by the relatively few, such as the members of the American Society of International Law, who have identified their interests and their hopes with the success of international law. It has been difficult in the past for us to be honest with ourselves with respect to some of the pretensions to completeness and effectiveness which come to us from some of our fellow-guardians of international law. Now, as discourse at the last annual meeting of the Society demonstrated at several points in the program, our science has been flattered anew and to a considerable extent by newly-found friends.

It is the purpose of this editorial to raise for consideration whether, as a result of the new attachments manifest in the recent past, international law might not stand in need of saving, not from its enemies, but from certain of its friends. In two major instances appeals have of late been based squarely upon assumptions as to what international law *is* or positively requires. In both instances the policy aspects are highly amenable, the competing interests clearly evident, and much of the discourse colored by the emotive use of language.³ One appeal to international law is that this law forbids the so-called *extraterritorial*⁴ application of the United States antitrust laws. The other is that international law was violated by the "confiscation" in time of war of enemy "private" property.⁵

The issues of policy involved in both situations are certainly issues upon which the writer of his latest book, is a subtle thing upon which this writer is not ready to take position.

The discussion on return of German and Japanese assets at the last annual meeting of the Society afforded several interesting examples of "good" words and "bad" words. For example, those in favor of return used the "bad" word "confiscation" to describe what had occurred when, during World War II, the Allied nations took in their own hands enemy assets. Those against return, somewhat uncomfortable to admit that while they too were against "confiscation," the analogy was to "let the enemy go to ruin," etc. Humpty Dumpty would have understood perfectly.

Utilized, because discourse does not always differentiate between: (1) the application of national law to foreign conduct if the actor is not within the territorial power of the state seeking to prescribe its rule for the conduct; (2) efforts of a state actually to enforce its law within the territory of another state; and (3) a broad or a narrow version of (1) above, involving expressions of opinion as to whether, and if so, under what circumstances, a state may apply its rule to conduct taking place outside its borders but having some effect (direct, indirect, slight, significant) within its borders or on its interests.

The current argument based on international law is summarized in DeVries, "The International Responsibility of the United States for Vested German Assets," 19 A.J.I.L. 18, 27 (1957). The inter-war debates, in which the late Professor Borchers participated with such vigor, will also be recalled. It is understood that a 1957 Policy Report from the White House, announcing a plan for settlement of war damages with Germany and for return of vested assets, bases its new position, not on the precepts of international law, but on "the historic American policy of maintaining the sanctity of private property." See 37 Dept. of State Bulletin 306 (1957). Cf. note 3, above.

which the minds of reasonable men could and do differ. These policy issues are not involved in this inquiry. The question here is whether the interests of international law are well served by the appeals made to it in connection with certain presentations in support of each of these issues.

In a recent report⁶ the Special Committee on Anti-Trust Laws and Foreign Trade of the Association of the Bar of the City of New York states:

. . . A further basic factor contributing to the resentment of the nationals of other countries over the extraterritorial application of our antitrust laws is the apparent disregard by us of traditions and principles of public international law. International law represents the standards and practices of civilized nations developed as a means of avoiding the conflict between sovereign powers that would result from the attempted exercise of jurisdiction by one sovereign over acts committed within the jurisdiction of another sovereign. The jurisdictional principles of public international law represent an advance from the concept of jurisdiction based on the sovereign's physical power to control; they are based upon a more sophisticated concept of the society of nations which presupposes the ability of the international community to arrive at a workable arrangement for allocating jurisdiction over problems that overlap territorial boundaries. The attempted extraterritorial application of the antitrust laws not only may result in a violation of principles of international law, but also may cause disrespect for the law of those individuals who unexpectedly are held accountable to a "foreign jurisdiction."

In the main, the principles of public international law provide that nations are limited in their jurisdiction to activities occurring within their physical boundaries. . . .⁷

While it is true that the objective of the Report is to support on grounds of desirable economic and security policy a proposal for legislative change in the antitrust laws to provide delegation of power to the Executive to authorize exemptions from the antitrust laws in certain types of international transactions where the President finds that the interests of the United States will be served thereby, an argument based upon international law as *lex lata* is definitely made. If the quoted assertion as to jurisdictional bases recognized in international law is correct, it obviously follows that the United States is a violator of international law when it seeks to apply its national laws against restrictive practices taking place abroad.

Similarly, when the argument is made that German and Japanese assets

⁶ National Security and Foreign Policy in the Application of American Antitrust Laws to Commerce with Foreign Nations 8-9 (1957).

⁷ The Report then proceeds (pp. 9-18) to examine the various possible bases upon which the United States could claim to exercise jurisdiction to apply its antitrust laws to conduct outside the United States and finds bases of jurisdiction to be dubious in law or exercises of jurisdiction undesirable or unfair in policy. As to the situation in law, *cf.* Fugate, Foreign Commerce and the Antitrust Laws, Ch. 2 (1958). The Report cited above states in its preface that the director of the study, Professor Kingman Brewster, took no part in the preparation of the Report and that his study will be published as a book, which ". . . will include Professor Brewster's own conclusions and recommendations, including his recommendations on the subject dealt with in this preliminary report."

not be returned because international law requires it, illegality under international law if they are not returned is explicit.⁸

Putting aside the issue whether it is wise to call too readily into question the propriety under international law of United States actions in situations where the assumptions as to what international law requires are debatable or dubious—and in the two situations under examination the range of dispute certainly justifies at least the former possibility—is there anything to be concerned about, if one is not a partisan as to the basic issues themselves?

From the standpoint solely of the institutional interests of international law it is submitted that there are at least three things to be concerned about:

(1) Overemphasis on a particular doctrinal point of view (such as that the territoriality principle is the sole, or at least the only major, basis of jurisdiction on which international law recognizes) may perpetuate or extend error. This is probably the least serious objection of the three, for doctrinal error can always be corrected by research, the accumulation of the authorities, argument, and decision.

(2) International law tends to be degraded to the level of the “seductive cliché” by vague, imprecise, unsupported resort in argument to certain supposed “principles.” It would not be fair to draw a parallel to De Johnson’s observation about the resort to patriotism when other arguments have failed, but it will do international law no good for it to become too often a kind of incantation to be resorted to for general emotive effect. At worst such resort raises problems of candor and implies intellectual disrespect for the integrity of the international legal order. Normally and without doubt in the situations under discussion, imprecise or incorrect appeals to supposed rules of international law have undesirable effects similar to those seen nationally in vague, uncritical appeals to concepts of substantive due process. The norm becomes so generalized, so unclear as a standard of conduct, as to cease to have normative significance. That is the end of the norm, and if carried very far, of the normative system and of efficacy.

(3) The last thought above leads to the most important of these three considerations, *viz.*, overly optimistic assumptions as to what is international law, obscure the very real need for exploration of new lines of development, of working toward solutions not yet actually provided by international law. To illustrate: The assertion that international law forbids the application of national laws on economic regulation to conduct outside

⁸In the context of the nature of the struggle in World War II and with some recollection of the purely symbolic nature of the reparations settlement (at the insistence of the United States), that this argument is even made is little short of astonishing to the writer. Questions of doctrinal correctness aside, the only apparent reasons why the more not more violent reactions to the argument are (1) man’s memory is only slightly longer than that of the gorilla; (2) the post-World-War II settlement planning and its relationship to wartime operations and planning have never adequately been described.

⁹Acknowledgment to Mr. Justice Frankfurter, writing in another context, hardly seems required.

the national territory deflects attention from the need which exists in international law for the development of new and better positive rules regarding the resolution of conflicts of jurisdiction.

As is well known, international law recognizes a number of jurisdictional principles; and these bases of jurisdiction may be claimed, in situations involving conduct having contacts with more than one state, by two or even more states. In general, international law does not contain any rule or set of rules which selects any one of the different bases of jurisdiction as the one which has paramount right to govern the conduct in question. A state does not lose a recognized power under international law to attach legal consequences to conduct under its law for the reason that another state also has a base of jurisdiction to prescribe its rule of conduct.

In a few areas, and to limited degrees even in those areas, general international law has worked out principles for the resolution of conflicts of jurisdiction. The "peace of the port" doctrine with respect to the exercise of either territorial or nationality jurisdiction to the exclusion of the other, where criminal conduct takes place aboard a visiting foreign commercial vessel, is almost exclusively illustrative of the development which has taken place, largely as a result of customary law and treaty law merging to develop a generally accepted rule as to priority in the exercise of jurisdiction.¹⁰ What reconciliations there have been of conflicts of jurisdiction have left many important problems untouched. These problems need attention, since important matters of hardship (to persons caught between the conflicting demands of two states having bases of jurisdiction) and of tensions between states remain unsolved. It does not contribute to their solution to have them ignored by incorrect assumptions that they do not exist.

National policy as to the reach of the antitrust laws and on ex-enemy assets need not, of course, turn upon present international law or await the development of new international law. Both these cases are hard cases and, were international law to be made solely for their solution, it would perhaps be bad law. It is encouraging to note that out of these controversies the first necessary step to the development of good international law in the areas involved may come.¹¹ The first step is

¹⁰ Treaties and reciprocal legislation have for some countries carried reconciliations of conflicting bases of jurisdiction into other areas, such as, for example, military service in the armed services of one country by resident nationals of the other. The choice-of-law rules of the conflict of laws also operate over the wide range of private interests to reduce actual conflicts in the exercise of jurisdiction. Cf. Stevenson, "The Relationship of Private International Law to Public International Law," 52 *Columbia Law Rev.* 568 (1952), and Jessup, *Transnational Law*, Ch. 3 (1957).

¹¹ See note 7 above. The American Law Institute's project for a re-study and restatement of the Foreign Relations Law of the United States has involved as yet unpublished research and analysis of Bases of Jurisdiction and of Conflicts of Jurisdiction. And see DeBevoise, "Treatment of Private Property of Foreign Nationals in Peace and War—Is a Code Desirable?", paper submitted to Oslo Conference, International Bar Association, July, 1956. On the enemy assets question the paper last cited excludes re-argument of the past and urges a look to the development of positive rules for the future.

to be in which the state of existing law and its underlying premises are carefully and accurately analyzed and the policy factors identified. Only in that way could there develop the new and the improved rules of international law.

The task is one which needs all the friends of international law. The "old-line" international law professionals must not be clammy. They must watch their communications to insure they are being understood. And, finally, they must be careful not to let insistence on accuracy in stating international law that *is*, be misunderstood as negativism or hesitancy about the very serious lack of law in places where there should be law. Other friends of international law must be willing to face the facts about the law that *is* and go on from there in the work toward development of more law.

The times seem right for this co-operative effort, not only because it is badly needed, but because several institutions¹² most important to development of international law are at present engaged in planning searching inquiries into the rôle and future of international law in the affairs of men and states. The time for real friendship to international law is now.

COVEY T. OGDEN

¹² Within the United States, the American Bar Association has appointed a special committee headed by the Honorable Thomas E. Dewey to re-examine the role of the Association to the field of international public law and to coordinate international organizations. The Executive Council of the American Society of International Law recently appointed a special committee to recommend measures by which the Society might contribute more effectively to the end of an increased respect for international law in the conduct of international relations. See also Henry B. Hall, "Pursuing the Work of Justice," 30 Conn. Bar J. No. 4 (1956), and the recommendations of American Bar Association President Rhyne in his address at the annual dinner of the Society, April 26, 1958.

NOTES AND COMMENTS

THE FIVE PRINCIPLES OF PEACEFUL CO-EXISTENCE

On October 1, 1957, the General Assembly of the United Nations decided without objection to inscribe on the agenda of its twelfth session a proposal of the Soviet Union requesting a declaration relative to the principles of peaceful co-existence.¹ The inscription was a significant step in the evolution of the Five Principles since their formal inception in 1954. Different political leaders at the Geneva Conference on Indochina, the Asian-African Conference at Bandung, and the Moscow convocation of Communists in connection with the fortieth anniversary of the Bolshevik Revolution have invoked what has been called the "Panch Shila." In general the Communist and uncommitted states of the world have supported the principles while the Western and pro-Western governments have questioned them in the form expressed. The origins of the terms "peaceful co-existence," "Five Principles," and "Panch Shila," the diplomatic evolution of the over-all concept, and an evaluation of its significance merit attention.

I

The expression "peaceful co-existence" has long been employed by Communist leaders in the Soviet Union. It has been used by Lenin, Stalin, and Khrushchev, reflecting a certain degree of continuity in the Communist vocabulary. Stalin, for instance, in reporting to the Fourteenth Congress of the Communist Party on December 18, 1925, asserted:

. . . the capitalist world is being corroded by a whole series of internal contradictions which are enfeebling capitalism; . . . on the other hand, our world, the world of socialism, is becoming more and more closely welded, more united; . . . because of this, on precisely this basis, there arose that temporary equilibrium of forces that put an end to war against us, that ushered in the period of "peaceful co-existence" between the Soviet state and the capitalist states.²

As late as November, 1957, Communists were openly referring to peaceful co-existence as a "Leninist principle." There can be no doubt that the expression is in its origins a Russian term within the framework of Marxist ideology.

The Five Principles *per se* are first found in the text of a treaty between India and the People's Republic of China on Tibet signed in Peking on April 29, 1954. They called for mutual respect for each other's territorial integrity and sovereignty, mutual non-aggression, mutual non-interference in each other's internal affairs, equality and mutual benefit, and

¹ For Soviet proposal, see U.N. Doc. A/3673, Sept. 20, 1957.

² J. V. Stalin, Works, 1925 (Moscow: Foreign Languages Publishing House, 1954), Vol. 7, pp. 293-294.

peaceful co-existence. Prime Minister Jawaharlal Nehru has indicated that the

agreement was the result of long correspondence between the Government of India and the People's Government of China. Premier Chou En-lai was not personally concerned with this matter, though no doubt he must have been consulted, as I was in India. . . . No individual can be said to father them [the Five Principles].⁴

Chinese Communist sources have tended to associate Prime Minister U Nu or Burma with Premiers Nehru and Chou En-lai in the origins of the concept. Li Kao, writing in *People's China*, has asserted that the principles were "worked out by the three Prime Ministers."⁵ At any rate it is obvious that four widely accepted approaches to international behavior were combined with a fifth, peaceful co-existence, to become the Five Principles of Peaceful Co-existence. And the use of the name of the 5th principle as an umbrella for the Five Principles gives the item particular importance.

The origin of the expression "Panch Shila" for the concept as a whole is clear. Prime Minister Nehru has asserted that when in Indonesia

. . . heard the words 'Panch Shila' mentioned . . . in an entirely different context, that is, in their Indonesian meaning, it struck me immediately that this was a suitable description of the five principles of international behavior to which we had subscribed. I said so there and repeated it on my return to India. The words caught on, especially in India, where they were easily understood, being derived from Sanskrit.⁶

In fact, Nehru prefers the spelling "Panchasheel," and has asserted that the expression has

been used from ancient times to describe the five moral precepts of Buddhism relating to personal behavior.⁷

II

The Five Principles of Peaceful Co-existence have been accepted by a large number of the governments of the world. Premiers Nehru and Chou En-lai envisaged them as the guiding principles in the relations between India and the People's Republic of China. They were reaffirmed in a communiqué of the two Asian leaders in New Delhi on June 28, 1954, and the following day they received further approval in a joint statement by Premiers U Nu and Chou En-lai in Rangoon. President Ho Chi Minh

⁴ Notes et études documentaires, No. 1912, Aug. 26, 1954, p. 3.

⁵ Letter to author from Prime Minister Jawaharlal Nehru, June 4, 1957.

⁶ Li Kao, "China and Panch Shila," *People's China*, No. 14, p. 10 (July 16, 1957).

⁷ Letter to author from Nehru, cited above. President Sukarno outlined the Pancasila of Panch Shila in a speech to the Investigating Committee for Preparation of Independence on June 1, 1945. His five principles for the Indonesian state are religionism, internationalism or humanism, consent or democracy, social prosperity, and God. See text of speech in Lahirnja Pantjasila (Djakarta: Ministry of Information, 1952), pp. 11-32.

⁸ Letter to author from Nehru, cited above.

of the Democratic Republic of Vietnam quickly added his support. At the final session of the Geneva Conference on Indochina the Chinese Communist Premier on July 21 specifically commended them.

In an important declaration issued by the Soviet Union and the People's Republic of China in Peking on October 11, 1954, it was asserted that the two governments would strictly observe the Five Principles in their relations not only with countries in Asia and the Pacific but also with other states. Participants in the Peking Conference included Messrs. Khrushchev, Bulganin, Mikoyan, and Shvernik from the Soviet Union and Mao Tse-tung, Chou En-lai, Liu Shao-chi, and Chu Teh from the People's Republic of China. On October 18 Prime Minister Nehru issued a joint statement with President Ho Chi Minh in Hanoi. The Viet Minh leader indicated his belief in the Five Principles and desired to apply them in the relations of the Democratic Republic with Cambodia, Laos, and other states. Nehru during a subsequent visit in the Chinese capital joined with Chou En-lai in praising the concept. Premier U Nu and President Ho Chi Minh took a similar stand on November 29 in Hanoi, and the Burmese leader joined Chou En-lai in Peking on December 12 in reaffirming faith in the principles. On December 23 Marshal Tito of Yugoslavia and Prime Minister Nehru issued a joint statement declaring the Five Principles the basis of relations between them; Burma and Yugoslavia on January 17, 1955, took a similar position. The statements obviously came in connection with the visit of the Yugoslav leader to India and Burma. Several weeks later Prince Norodom Sihanouk of Cambodia discussed common problems with Prime Minister Nehru in New Delhi, a joint communiqué on March 18 indicating that the Five Principles in effect were the "best guarantee" for peace. From then on the Cambodian Prince stressed in numerous statements the importance of the concept.⁸

The Asian-African Conference at Bandung from April 18 to April 24, 1955, was important in the evolution of the principles. Here the Kingdom of Laos openly joined in subscribing to them, an agreement between Pham Van Dong, Foreign Minister of the Democratic Republic of Vietnam, and Katay D. Sasorith, Prime Minister of Laos, calling for relations between the two neighbors along these lines. Subsequent statements by other Laotian leaders like Prince Souvanna Phouma, presently Prime Minister, and Prince Souphanou Vong, Pathet Lao leader, as well as Katay D. Sasorith support the concept.⁹

Despite the efforts of the Asian states subscribing to the Five Principles to get the Bandung Conference of twenty-nine countries in Asia and Africa to accept them, the final communiqué of the Conference included a Declaration on the Promotion of World Peace and Co-operation, listing ten principles and omitting reference to peaceful co-existence. In place of the controversial term, the phrase "live together in peace" was em-

⁸ For instance, the importance placed on Panch Shila is clearly brought out in a letter to the author from Prince Norodom Sihanouk, Dec. 31, 1956.

⁹ Letters to author from Prime Minister Souvanna Phouma, Dec. 13, 1956, Prince Souphanou Vong, Oct. 25, 1957, and Katay D. Sasorith, May 4, 1957.

principles, obviously borrowed from the Charter of the United Nations. . . . In the eyes of the Chinese Communists, are really 'an extension and development of Panch Shila.'¹⁰ Chou En-lai's diplomatic efforts, both inside and outside the conference rooms, was directed at influencing the Chinese, skeptical of the peaceful intentions of his government, and the Soviet delegate who even proposed substituting "live together in peace" for "peaceful co-existence." He later told the Standing Committee of the National People's Congress in Peking on May 13 that "in actual fact, the co-existence of different social systems to live together in peace is the same as peaceful co-existence. . . ."¹¹

After the Bandung Conference the Chinese Premier formally paid a visit to Djakarta, the capital of Indonesia. In a joint statement with the President and Prime Minister Ali Sastroamidjojo issued on April 28, both parties supported in effect the Five Principles. On June 16 U Nu announced that he had again praised them in connection with the former's visit to Yugoslavia. Nehru for his part during a memorable trip to the Soviet Union issued a statement on them with Premier Bulganin on June 22, concerning which the Indian leader notes:

. . . there was a slight amendment and extension of these principles. No. (3) [non-interference in each other's internal affairs] became "non-interference in each other's internal affairs for any reasons of economic, political or ideological character."¹²

On June 26 Nehru and the Prime Minister of Poland issued a joint statement supporting the Five Principles. The Indian Prime Minister and Marshal Tito on July 6, during a visit of the former to Yugoslavia, called for "peaceful and active coexistence." On August 1 Nepal and the People's Republic of China asserted that their relations should be based on the Five Principles as recently stated by the Soviet and Indian prime ministers. U Nu went to Moscow in the fall, he and the Soviet Premier agreed in a communiqué of November 3 on the principles as defined by Nehru and Bulganin. For their part Khrushchev and Bulganin visited India, Burma, and Afghanistan in November and December. In joint statements and speeches the Five Principles of Peaceful Co-existence were further praised. Premier Bulganin and Prime Minister Sardar Mohammed Daud Khan of Afghanistan, for instance, agreed in a statement issued December 18 on the Five Principles as accepted at the Bandung Conference.

Prime Minister Nehru visited Ceylon in May, 1957, a joint statement issued May 20 by him and Prime Minister S. W. R. D. Bandaranaike expressing faith in the "Panch Shila" and asserting the principles were a part of, and extended by, those adopted at Bandung. Ho Chi Minh during his visit to Eastern Europe in the summer reaffirmed his loyalty to the "Panch Shila." For instance, he and Tito on August 9 called for "peaceful and

¹⁰ Le Kuo, *loc. cit.* 10.

¹¹ Quoted in George McTurnan Kahin, *The Asian-African Conference* 63 (Chicago: Cornell University Press, 1956).

¹² Letter to author from Nehru, cited above.

active coexistence between all countries regardless of the existing difference of social systems."¹³ It was claimed that

a special contribution may be made by socialist countries by developing their cooperation and international activity on the basis of full equality in their relations. . . .¹⁴

The fortieth anniversary of the Bolshevik Revolution was marked in Moscow by a meeting at the summit of key Communist leaders except Tito. Khrushchev reported to the Supreme Soviet on November 6 that

socialism and capitalism exist on one planet and their coexistence is an historic inevitability. . . . Peaceful coexistence should be built on life without war, on the basis of peaceful competition.¹⁵

Later in the month, a declaration of the representatives from twelve Communist and Workers' Parties of the countries they dominate and a manifesto of 64 Communist and Workers' Parties in the world called in glowing terms for the principle of peaceful co-existence. In the latter statement reference was specifically made to the Five Principles.¹⁶ It is clear that the "Panch Shila" has become one of the most celebrated concepts of the contemporary period.

III

Within its Communist framework peaceful co-existence by no means implies an end to the strife between the Communist states led by the Soviet Union and the Western alignment led by the United States. The class struggle applied to world politics is fundamental. Sir Roger Makins, former British Ambassador in Washington, has aptly said:

For the Russians it [peaceful co-existence] signifies a temporary detente during which they can build up Communist strength and sap the will of the free world, a state of what has been called provisional nonbelligerency.¹⁷

Although Lenin and Stalin envisioned armed conflict between the Communist and capitalist states after "a certain period" or the "temporary equilibrium" of peaceful co-existence, the rapid advances in technological warfare with the possibility of mass destruction for both sides in the event of a total war, have caused Khrushchev to suggest the ending of the transition period not through armed conflict but through the growing strength of the "peace-loving" states and the self-destruction of the capitalist world. But here is found a fundamental dilemma, well stated by R. I. Aaron and P. A. Reynolds:

¹³ Official Communiqué on Viet Nam-Yugoslavia Talks, Viet Nam Information Bulletin No. 35/1957, Aug. 30, 1957 (News Service of the Viet Nam Democratic Republic, Rangoon).

¹⁴ *Ibid.*

¹⁵ Report by N. S. Khrushchev to the Jubilee Session of the Supreme Soviet of the U.S.S.R., Nov. 6, 1957, New Times, No. 46 (Nov. 14, 1957), Supplement, p. 26.

¹⁶ Peace Manifesto, New Times, No. 48 (Nov. 28, 1957), p. 2.

¹⁷ Sir Roger Makins, "The World Since the War: The Third Phase," 33 Foreign Affairs 13 (October, 1954).

either capitalist-proletarian conflict is the overriding force in modern society, in which case the capitalists *must* ultimately fight to save themselves from destruction—and this means universal death; or on the other hand fear is an even more powerful force, in which case the element of inevitability in capitalist-proletarian conflict is removed, the Marxist analysis is denied, and the premises upon which the concept of peaceful coexistence is founded are destroyed.¹³

The Communist leaders in general have supported the wedding of peaceful co-existence with the other four of the Five Principles, for it provides a common ground of understanding, at least for propaganda purposes, between the Communist states and the uncommitted countries of Asia. The Chinese Communists have gone a step further, asserting that the "Panch Shila" has been "rejected by those who libelously accuse China of having aggressive intentions."¹⁴ But here the Peking regime is reading into the concept a meaning that would not be widely accepted by the uncommitted states.

Basically Prime Ministers Nehru and Nu believed the Five Principles would help to destroy apprehension, create confidence, and establish security. The alternative to peaceful co-existence was mutual destruction in a thermonuclear war. Adherence to the "Panch Shila" would expand the "area of peace." Alliances, on the other hand, were conducive to dividing states who should be friendly neighbors. Universal acceptance of the "Panch Shila" would contribute to a worldwide system of collective peace. At the same time it was realized that the Five Principles did not constitute a "magic formula." There is no evidence to suggest that either Nehru or Nu accepted the strict Communist interpretation of peaceful co-existence.

The Western and pro-Western Powers have continued to be concerned over the implications of the technical use of the term. Sir Roger Makins has suggested that "*modus vivendi*," implying a balance of peace through strength, was a better expression. He notes "it enjoys the decent obscurity of a dead tongue, perhaps has less risk of becoming a popular catchword."¹⁵ Henry Cabot Lodge, United States Representative to the General Assembly of the United Nations, told the General Committee on September 30, 1957, in discussion on the inscription of the Soviet item on the Five Principles, that

these principles, stated in another way, are what we are all committed to by our adherence to the Charter of the United Nations. All men of good will approve such ideas.¹⁶

On December 14, 1957, the General Assembly, by a vote of 77 to 0 with Nationalist China abstaining, adopted a resolution submitted by India, Yugoslavia, and Sweden, calling, *inter alia*, for "peaceful and tolerant"

¹³ R. I. Aaron and P. A. Reynolds, "Peaceful Coexistence and Peaceful Cooperation," 4 *Political Studies* 295 (October, 1956).

¹⁴ Liac Kai-lung, "Two Mighty Forces Join Hands," *People's China*, No. 11, p. 1 (June 1, 1957).

¹⁵ Makins, *loc. cit.* 13.

¹⁶ Statement by Henry Cabot Lodge, 37 Department of State Bulletin 693 (1957).

relations" and "friendly and cooperative relations" among states.²² It is significant that the expression "peaceful co-existence" was not used in the text. The Russian Delegation considered its draft resolution "more precise and more consequential" but found "nothing objectionable" to the proposal of India, Sweden, and Yugoslavia. The fact that India sponsored such a resolution in view of Prime Minister Nehru's frequent use of "peaceful co-existence" did not pass unnoticed. The United States, of course, was glad to see the expression omitted, opposing the use of "artful phrases."

RUSSELL H. FIFIELD

REPORT OF THE ADVISORY COMMITTEE ON FOREIGN RELATIONS TO THE
HISTORICAL DIVISION OF THE DEPARTMENT OF STATE¹

The Advisory Committee on the Foreign Relations of the United States was appointed at the request of the Chief of the Historical Division of the Department of State. In the selection of the Committee three leading national associations interested in the field of foreign relations were approached—the American Historical Association, the American Political Science Association, and the American Society of International Law—and all three accorded their co-operation. Nominations were made by these three societies, and the nominees were accepted by the Department of State as the members of the Committee. Those present were: Professor Thomas A. Bailey, Stanford University; Professor Clarence A. Berdahl, University of Illinois; Professor Leland M. Goodrich, Columbia University; Professor Richard W. Leopold, Northwestern University; Professor Dexter Perkins, Cornell University; Professor Philip W. Thayer, School of Advanced International Studies, The Johns Hopkins University, and Mr. Edgar Turlington, Attorney-at-Law, Washington, D. C.

The Committee met on the 6th and 7th of December, 1957. The meeting was first addressed by Dr. G. Bernard Noble, Chief of the Division, who presented the principal problems to be discussed. Dr. Noble indicated that the series known as "Foreign Relations" was initiated in 1861, and that at the outset, and indeed during the 19th century, publication was on a fairly current basis. By 1920, however, there had developed a lag of about seven years, and by the 1930's the lag had become fifteen years. In the course of the last few years requests have been made by several Senators, supported by the Senate Appropriations Committee, for the publication of a special series of documents having to do with the various international conferences, and with our relations with China during the 1940's. Thus an additional burden has been placed upon the Division. In addition, the preparation of these volumes raised important questions of clearance, which produced further delay so that as of the present date an unusually large number of volumes are in the pipeline.

Dr. Noble submitted the following major questions to the Committee: (1) Should coverage in "Foreign Relations" continue on as extensive a basis

²² For text of resolution as adopted, see U.N. Doc. A/3802, Dec. 14, 1957.

¹ April, 1958.

as in the past, in view of the mass of records? (2) If a crash compilation is made in the scope of compilation, what principles should apply in regard to the inclusion and exclusion of documents? (3) What should be the policy with regard to including documents from other agencies? (4) What can be done with regard to the clearance problem? He also asked the advice of the Committee as to the desirability of an index and table of contents, the identification of the individuals mentioned in the text, and the use of ascriptions to indicate the origin of a given document in the internal organization of the Department.

The Committee was also addressed by Mr. Andrew H. Berling, Assistant Secretary of State for Public Affairs, who laid stress on the increasing complexity of the problem of publication, and by the Secretary of State of the United States. Secretary Dulles alluded to the difficulties in the way of a complete record of events of recent date, and the possibility of embarrassing the current operations of the Department. He also called attention to the publication of other volumes which, while not meeting the conventional requirements of the "Foreign Affairs" series, "do go quite a ways toward meeting the needs of scholars." He called attention to the first volume on "American Foreign Policy from 1950 to 1955," covering 1700 pages, which had already appeared, and indicated that the second volume was in preparation.⁶ He also pointed out that the Division was trying to get out a volume for the next two years, 1955-57, and thereafter would attempt to publish on an annual basis. He pointed out that

while this reflects only non-classified documents, the pressure for knowledge about documents which comes from the press and Congress is so great that there is included in a volume like this a great deal of material which normally or in the past would have been kept classified.

He stated further:

We have adopted the practice, in the interest of information to scholars, of publishing special pamphlets or booklets dealing with international conferences or periods of special concern. We have put out a series of books on the Berlin Conference with the Russians in '54, the conferences which led up to the bringing of Germany into NATO, and the conference of the London-Paris Accords of '54, the "Summit" Conference, the Conference of Foreign Ministers that followed the "Summit" Conference, the documentation with reference to the Suez Conferences that were held in London, and then the documents with reference to the subsequent evolution of that into the crises that began with the Israeli and the British and French attack of a year ago in October or November, along through that period. Those publications do include a considerable amount of information which, in that particular form at least, was classified at the time and which was subsequently released with the consent of the governments concerned, and constitutes another important addition to the information available to scholars and is pretty much current. We have been able to get those volumes out within a few weeks after the closing events which they dealt with. So that we are making a very considerable effort to make available to students and scholars, and those interested in public affairs, a very large amount of material which partially

New published.—ED.

at least covers what normally would be covered by the "Foreign Affairs" volumes.

The Committee, after hearing the three gentlemen named, discussed in the afternoon of December 6, and the morning of December 7, the problems which had been presented to it. Other officers of the Division and of the Department participated in the discussion. The offices of the Division were visited also. At the meeting of Saturday morning, December 7, Professor Dexter Perkins was elected Chairman, and delegated to prepare the report. The report, herewith submitted, has received the unanimous adhesion of the members of the Committee.

THE REPORT

Before entering on a concrete discussion of the questions raised in our discussions, the Committee desires to record its unanimous opinion that the Division is manned by persons of ability, integrity and devotion. Dr. G. Bernard Noble, Chief of the Division, Dr. E. R. Perkins, editor of "Foreign Relations," and Dr. William M. Franklin, Deputy Chief of the Division, all deserve high praise for the quality of their work.

In his introductory remarks, as previously indicated, Dr. Noble alluded to the additional burden thrown on the Division by the request for publication of more recent materials. The Committee expressed no opinion as to whether or not it is desirable to publish such volumes, though it is proper to call attention to a resolution of the American Historical Association, adopted at its December meeting of 1956, urging that materials be published in their regular chronological order. The Malta-Yalta volume deserves favorable notice. In its preparation, a new procedure was established. Not only were the records of the conference given in the greatest detail, but sources external to the Department were examined on a wide scale. The Committee believes that the course of action taken is to be approved, and might be followed in dealing with later conference volumes.

On the other hand, the difficulties involved in such a procedure must be fully realized, especially with regard to materials in the possession of other agencies of the government. In the war and postwar periods foreign relations have become increasingly a matter of concern to many such agencies, as for example, the Department of Defense, and the Treasury. The establishment of the National Security Council in 1947 has created a new situation, for in this body vital problems of foreign policy are discussed. When relevant papers are sought outside the State Department, they may turn out to be classified. Even if they are not, the process of securing them is a cumbersome one. Not everything that is desired can always be obtained. In dealing with this problem in the future the rule of essentiality must be applied. The officers of the Division must themselves determine whether the withholding of given documents provides a sufficient reason for delaying publication, or whether they will go ahead with incomplete materials. The prospect of indefinite postponement of a given project must be weighed against the desirability of providing a complete record.

What has been said, it must be emphasized, applies to the conference volumes, and to other enterprises of similar character. It is the feeling of the Committee that the annual "Foreign Relations" volumes are by origin and nature a State Department record, and that it would not be practicable to range far afield in preparing them for publication. This is particularly true since the time lag in these volumes has now become unduly long. Indeed, in the compiling of future volumes, advantage may be taken of the publication of the conference volumes, or of other relatively contemporary materials, to abridge the "Foreign Relations" themselves and by cross-reference to materials already published to reduce the bulk, and expedite their preparation.

With regard to the general problem of expediting "Foreign Relations" the following observations seem pertinent.

No one who knows the facts of the matter can fail to realize that in the conditions that have existed of recent years, it is neither possible nor desirable to publish everything that comes in and goes out of the Department. Even with the principle of selection to some degrees accepted, the number and size of the volumes has grown portentously.

In the year 1913, just before the First World War, the number of pages in "Foreign Relations" was under 2000. By 1939, it had more than doubled. Furthermore, for the year of the Peace Conference, 1919, it ran to over 13,000 pages. Clearly, under the conditions that now exist an enormous amount of work is required. Nor is it likely that the volume of documents produced in our diplomatic interchanges is likely to decline. On the contrary, the probability is that it will grow.

As a matter of fact, for some time various categories of material have been excluded from the annual volumes, as can be seen from the list given on a subsequent page. The Committee believes that further limitations may be necessary, both in the interest of prompter publication, and of sound policy from a budgetary point of view. In considering this matter, the Committee took into account four possibilities as suggested by the Division

- (1) Tighten up on present basis of selection, using the same range of subjects but excluding more documents of marginal value.
- (2) Narrow the range of topics to be covered, leaving out those marginal or of slight value.
- (3) Abandon the present comprehensive coverage of all areas and all important "general" subjects (*e.g.*, multilateral conferences) on a year-by-year basis, and concentrate efforts on subjects or problems of major importance. On this basis compilations would be made and released as soon as clearances are possible.
- (4) Abandon the idea of giving a continuous story in documentary form, and print only key policy papers.

After mature consideration of the problem, the Committee considered that the first two of these possibilities were more acceptable than the third and fourth.

This brings us to the question of clearance. It is quixotic to imagine that documents in the field of foreign relations can be published without

limitation of any kind. Consideration for the interest of other governments in the record enters into the account and must so enter. Indeed, the Division is required by normal practice to ask for permission to publish documents originating in other foreign offices, or similar agencies. Moreover, a long-standing regulation declares that omissions are permissible for the following reasons:

- (a) To avoid publication of matters which would tend to impede current diplomatic negotiations or other business.
- (b) To condense the record and avoid repetition of needless details.
- (c) To preserve the confidence reposed in the Department by individuals and by foreign governments.
- (d) To avoid giving needless offense to other nationalities or individuals.
- (e) To eliminate personal opinions presented in despatches and not acted upon by the Department. To this consideration there is one qualification—in connection with major decisions it is desirable, where possible, to show the alternatives presented to the Department before the decision was made.

These regulations were adopted in 1927, and are still in force. The rationale behind them is not difficult to discover. Sharp criticism of a government with which we are in alliance, in an official publication may be resented even if the criticism goes back many years. The confidential remarks of a foreign minister, who is still an important figure in his own country, may be, if quoted, a matter of embarrassment to him, and to our diplomatic relations. It would be a dogmatic person, indeed, who would maintain that no occasion could possibly arise in which the publication of historical materials might cause present embarrassment.

At the same time it is easy to take an unduly apprehensive view of the impact of historical materials on current negotiations and associations. And this is particularly true in such a country as the United States where the press catches up and publishes so much material on foreign affairs, not all of it flattering to other governments or individuals. It is in the interest of the public and the Department to secure as wide a public record as possible. There is no doubt in the minds of the members of the Committee that it should operate on this assumption, and should contend vigorously for maximum freedom. It should not conceal error, or reversal of policy. Where it meets with resistance, such resistance is likely to come from the so-called geographic desks, whose officers may be and sometimes are over-sensitive as to the effects of publication. If the officer at the geographic desk is obdurate, appeal may be made, and is not infrequently made, to the Secretary of State, and as a matter of record the Secretary has not been ungenerous in meeting the views of the Division. But if appeal to the highest authority fails, what then? The question, as it seems to the Committee, is then one of proportion. If the materials to be excised affect the integrity of the scholarly record, it may be necessary not to publish at all until the problem of clearance can be resolved. If,

on the other hand, the objections taken relate to relatively small matters which do not affect in any important way the general picture or lead to false conclusions, then it may be desirable to publish with some indication of the fact that in a given instance material has been omitted. The members of the Division, the Committee desires to reiterate, are accredited scholars of unimpeachable integrity and fine training. They can be trusted to exercise their functions with sound judgment, and always with the desire that the record be as complete as possible.

With regard to the questions of detail presented to the Committee by Dr. Noble, the Committee believes (1) that an index is highly desirable; (2) It should be sufficient to identify individuals at the foot of the page, duly indexed, on which their names appear. [One member believes a list of important figures in the front of the volume is desirable.] (3) It is the general view of the Committee that there should be a table of contents, and that documents should be classified by country or subject and printed in chronological order within these classifications. (4) The Committee is unanimously opposed to ascription. One member of the Committee states the matter cogently: "It seems to me that ascription is likely to mean more caution and less frankness on the part of those who are asked for their views, who write memoranda, and who draft papers, telegrams, instructions, etc. The responsibility should be in no sense ascription tends to do, upon these officers, but must always be assumed by the higher political officer."

One final word: The problems involved in the Division are in no sense problems of personal competence or integrity. Nor can any systematic publication be devised which will not involve the exercise of judgment and discretion on the part of the staff. The work which they have in charge is voluminous in extent, the delays in execution are closely connected with the heavy demands made upon the Division, with the cumbrousness of governmental machinery, and with the very real problem of clearance. These delays might conceivably be overcome, at least in part, by more generous appropriations; but clearance is and will continue to be a perennial problem. There is a genuine dilemma involving, on the one hand, the justified desire of the public to be informed, on the other, the necessity for maintaining confidential relationships with other governments and protecting individuals or governments from needless offense. The public interest is, of course, the paramount consideration. But no formula exists by which this interest can be determined for all times and cases. Inevitably, discretion must rest with those responsible for publication. That the Historical Division is and should be concerned with the publication of as full a record as is possible, taking into account all the factors in the equation, is the unanimous opinion of the Committee.

THIRD HISPANO-LUSO-AMERICAN CONGRESS OF INTERNATIONAL LAW

In 1951 the first Hispano-Luso-American Congress took place at Madrid. There was also created the Hispano-Luso-American Institute of International

¹ See this writer's note in 45 A.J.I.L. 777-778 (1951).

tional Law. It has its seat at Madrid; the outstanding Spanish international lawyer, Professor José de Yanguas Messía is its Director. Like the American Institute of International Law, founded in 1912 by James Brown Scott and Alejandro Alvarez, it has obviously the universal *Institut de Droit International* as model.

The second Congress was held at São Paulo in 1953, the third in October, 1957, in Quito, Ecuador. There the Statutes of the Institute were approved. Two resolutions were adopted with regard to conflict of laws: (1) the law governing the formalities and substantive requirements of marriage; as that law the *lex loci celebrationis* was proposed, which also corresponds to American law, but with three exceptions: the reservation of "*fraude à la loi*," marriages concluded before diplomatic or consular agents, and what the canon law calls "*impedimenta dirimentia*"; the latter are governed by the personal law of each spouse, which in most of the countries concerned is the law of nationality, but in some the law of domicile; (2) the law which governs acts and occurrences on board an airplane in flight. This resolution is also conceived in terms of the quasi-universal treaty law.

Three problems of international law were treated. First there is a draft treaty on the special legal status of nationals, pertaining to countries of the Hispano-Luso-American community. This is perfectly proper: for this treaty would create only particular international law, valid for the ratifying parties *inter se*. The resolution on state responsibility for damages caused to foreigners contains, of course, the well-known political postulates of Latin America (non-intervention, equality as the maximum for aliens, narrow definition of denial of justice). The resolution on the "*dominio de las Naciones sobre el mar*" is based on the so-called "Principles of Mexico" of 1956 which are called "*una expresión de la conciencia jurídica americana*." We hardly understand how such a statement could have been made on October 12, 1957. The United States has protested in sharpest terms against the procedure and contents of these so-called "principles" and has stated in unequivocal terms: "Much of the Resolution is contrary to international law."²

The fourth Congress will be held from October 2 to 12, 1958, at Ciudad Trujillo, Dominican Republic. On its agenda are two problems of conflict of laws: personal and property relations between spouses, and international aerial criminal jurisdiction, as well as four problems of international law: revision of treaties; status, function and immunities of consular agents; immunities of diplomatic agents and—particularly interesting—the co-ordination of the United Nations system for the pacific settlement of international conflicts with that of the Organization of American States (Rapporteur Professor Eduardo Jiménez de Aréchaga, Uruguay).

JOSEF L. KUNZ

² For a full exposé see this writer's study: "Continental Shelf and International Law. Confusion and Abuse," in 50 A.J.I.L. 828-853 (1956).

PRIZES INSTITUTED BY JAMES BROWN SCOTT IN MEMORY OF HIS MOTHER
AND HIS SISTER JEANNETTE SCOTT

The Institute of International Law has announced the subject for the Samuel Pufendorf Prize (1200 Swiss francs) to be awarded in 1960. The subject chosen is: "The Position of Third States with Regard to the European Coal and Steel Community."

The contest is open at anyone except members or associates, or former members or associates of the Institute.

The essays submitted should be unpublished manuscripts of not less than 150 nor more than 500 pages, corresponding to a printed page of octavo format. Essays may be written in English, French, German, Italian or Spanish. They should be sent anonymously and in three copies. Each copy must be supplied with a double motto. The same mottoes should be inscribed on an envelope containing the surname, the Christian names, the date and the place of birth, the nationality and the address of the author. The essays must be in the hands of the Secretary General of the Institute of International Law (Professor Hans Wehberg, 1 avenue de la Grenade, Geneva, Switzerland) not later than December 31, 1959.

The detailed rules of the competition will be found in the *Annuaire de l'Institut de Droit international*, Vol. 46 (1956), p. 491.

E. H. F.

ANNUAL MEETING OF THE SOCIETY

The American Society of International Law held its 52nd annual meeting at the Statler Hilton Hotel in Washington, D. C., April 24-26, 1958. The meeting was attended by approximately 300 persons. The general theme was "International Law and the Political Process." The session began on Thursday afternoon, April 24, and concluded with the annual dinner on Saturday evening, April 26. An innovation in the form of the meeting was made this year in that the sessions on Friday, April 25, consisted of several simultaneous panel discussions. Three panel discussions took place in the morning of Friday and three others in the afternoon of that day. Full sessions were held on Thursday afternoon and evening, and Friday evening, with an informal reception for the members of the Society and their guests on Friday afternoon. All of the sessions concluded with a general discussion from the floor of the papers and comments of the panelists.

The first session, beginning at 2:00 p.m. on Thursday, April 24, was devoted to the subject of "The National Decision-Making Process and International Law." The principal speakers were Professor John M. Howell of East Carolina College, and Mr. Walter S. Surrey of the D. C. Bar. Under the title of "Grassroots International Law," Professor Howell discussed the hearings held throughout the country in 1954 and 1955 by a subcommittee of the Senate Foreign Relations Committee to ascertain public opinion on the question of revising the United Nations Charter. Mr. Walter S. Surrey, taking as his subject "The Legislative Process and International Law," discussed the rôle of Congress in the development

and execution of United States foreign policy. Comments upon these two papers were provided by Dr. Alwyn V. Freeman, Deputy Representative of the International Atomic Energy Agency at United Nations Headquarters, Dr. Charles G. Fenwick, Director, Department of International Law, of the Organization of American States, and Mr. Wesley W. Cook, Director, Upper South Region and Synthetic Yarn Division, Textile Workers' Union of America, A.F.L.-C.I.O.

On Thursday evening at 8:15 p.m., President Robert R. Wilson, in his address formally opening the 52nd annual meeting, discussed "International Law and Some Contemporary Problems." The guest speaker of the evening was Sir Leslie Munro, Ambassador of New Zealand to the United States, and President of the 12th Session of the United Nations General Assembly. Sir Leslie discussed "Recent Developments in the Rôle of the General Assembly in the Maintenance of Peace."

The general subject on Friday, April 25, was "Some Current Issues of U. S. Public Policy and International Law." Beginning at 10:00 a.m., simultaneous panel discussions were held on the return of enemy-owned private property (Panel I), "Foreign Public Entities as Litigants in the U. S. Courts" (Panel II), and the *Interhandel* Case (Panel III).

On the subject of return of enemy-owned property, Mr. William Harvey Reeves of the New York Bar, and Professor Kenneth S. Carlston of the University of Illinois Law School, spoke in favor of return. Mr. Victor C. Folsom of the New York Bar, and Mr. Robert B. Ely, III, of the Pennsylvania Bar, argued against return. The remarks of the panelists were followed by a lively discussion from the floor.

Various aspects of "Foreign Public Entities as Litigants in U. S. Courts" were presented by Donald E. Claudy of the D. C. Bar, who discussed "The Tate Letter and the *National City Bank* Case: Implications"; Professor Alona E. Evans of Wellesley College, who spoke on the question "Should Sovereign Immunity be Governed by Reciprocity?"; and Miss Alice Ehrenfeld of the Office of Legal Affairs, United Nations, who discussed "United Nations Immunity Distinguished from Sovereign Immunity." Mr. George S. Leonard, of the Civil Division of the Department of Justice, presented some observations on "The United States as a Litigant in Foreign Courts."

The principal speaker on the *Interhandel* Case was Mr. Malcolm S. Mason of the New York Bar, whose remarks were entitled "Some International Aspects of the General Aniline and Film Case." The speaker supported the position of the United States in its dispute with Switzerland concerning the assets of Interhandel, now before the International Court of Justice, that the Court does not have jurisdiction over the dispute because the matter involved is essentially within the domestic jurisdiction of the United States and has been reserved from the jurisdiction of the Court under the terms of the United States acceptance of the compulsory jurisdiction clause. Contrary views were expressed by the panel of commentators, consisting of Professor Rosalind Branning of the University of Pittsburgh, Professor Herbert W. Briggs of Cornell University, Editor-in-Chief of this JOURNAL, and Dr. Wallace McClure of the University of Virginia, and a lively debate ensued.

On Friday afternoon at 2:00 p.m. the general subject was "Conflicting National Policies and Some Current International Problems." Under this heading the following topics were discussed in separate panels: "Legal Problems and the Political Situation in the Polar Areas" (Panel IV); "Jurisdiction over Members of Armed Forces Serving on Foreign Territory" (Panel V); and "Legal Problems of International Private Enterprise" (Panel VI).

The principal speakers on the Polar areas were Professor Oscar Svartholm of the University of Florida, who discussed "The Legal Status of the Arctic," and Mr. John Hanessian, Jr., U. S. National Committee 1957-58 National Academy of Sciences, who spoke on "Antarctica: Current National Interests and Legal Realities." Comments were presented by Commander Paul W. Frazier, U.S.N., Chief of Staff to Rear Admiral George J. Dufek, U. S. Antarctic Projects Officer, Department of Defense and Alan F. Neidle, of the Office of the Legal Adviser of the Department of State.

Professor Richard Baxter of the Harvard Law School presented the principal address on the question of jurisdiction over members of the armed forces abroad, and took as his subject "Jurisdiction over Visiting Forces and the Development of International Law," in which he discussed the criminal jurisdiction provisions of the NATO Status of Forces Agreement and related agreements. Comments from several points of view were provided by Mr. Vincent Evans, Legal Adviser, United Kingdom Delegation to the United Nations, Mr. Monroe Leigh, Assistant General Counsel (International Affairs), Department of Defense, Reverend Joseph M. Sweeney, S.J., Georgetown University Law Center, Mr. Fritz C. Menne, First Secretary and Legal Adviser, Embassy of the Federal Republic of Germany, and Dr. Urbano A. Zafra, Minister Counselor, Embassy of the Philippines. The subject matter of this panel also provoked spirited discussion.

On the subject of "Legal Problems of International Private Enterprise" the panelists were the Honorable James G. Fulton, of the Committee on Foreign Affairs of the House of Representatives, Mr. Juan Huzera, Alternate Representative of Costa Rica on the Council of the Organization of American States, Mr. Norman M. Littell of the D.C. Bar and Professor Charles O. Galvin of Southern Methodist University Law School. Representative Fulton was unable to present his paper in person, but it was read by his Administrative Assistant, Mr. Allan Hutchison. Mr. Huzera spoke on "Latin America's Capital Requirements." Mr. Littell discussed "Encouragement and Obstruction to Private Investment in Foreign Investment Laws," and Professor Galvin offered "Comments on the Oil and Gas Entrepreneur and Mineral Concessions in Latin America."

On Friday evening at 8:15 p.m. the general subject was "Recent Technological Developments: Political and Legal Implications for the International Community." Under this heading two papers were presented, one by Dr. Eugène Pépin, Director of the Institute of International Law at McGill University, on "Space Penetration," in which he discussed the legal problems related to the peaceful use of outer space, and one by

Mr. Bernhard G. Bechhoefer of the D. C. Bar, entitled "Weapons Control," discussing the international negotiations on disarmament and control of nuclear weapons. The two papers were followed by comments by Professor Oliver J. Lissitzyn of Columbia University, and Mr. Oscar Schachter, Director of the General Legal Division of the United Nations Office of Legal Affairs.

On Saturday evening, April 26, at 7:00 p.m., the annual dinner concluding the sessions took place in the Federal Room of the Statler-Hilton. The speakers after dinner were the Honorable Loftus E. Becker, Legal Adviser of the Department of State, the Honorable Charles S. Rhyne, President of the American Bar Association, and His Excellency Señor Don Ricardo M. Arias E., Ambassador of Panama to the United States and to the Organization of American States. Mr. Becker discussed "Some Political Problems of the Legal Adviser," referring particularly to the *Interhandel* Case before the International Court of Justice, the *Girard* case regarding jurisdiction over members of the U. S. Armed Forces abroad, and the International Conference on the Law of Sea held in Geneva, Switzerland from February 4 to April 27, 1958.

Mr. Rhyne spoke on "The Law's Expansion in a Constricted World," emphasizing the necessity for substituting law for force in international relations, and urging: (1) creation by the State Department of a section of experts whose sole function would be to concentrate on law as a program capable of creating a "break-through" to achieve and maintain peace; (2) intensified effort by the organized bar to achieve such a "break-through"; (3) maintenance of international law as a required course in American law schools; (4) furtherance by all government agencies of the use of law in all international contacts; (5) pressure upon the United Nations and other international agencies to bring law, legal procedures and legal methods to the forefront in all deliberations and to make more use of the International Court of Justice and its advisory jurisdiction; (6) united efforts by the lawyers of America in urging removal by the United States of the present reservation to its acceptance of the compulsory jurisdiction of the International Court of Justice, so that such jurisdiction will apply to all international disputes in the future.

Ambassador Arias in his remarks pointed out the efforts of Simon Bolívar to establish a continental organization for peace and co-operation, and outlined the Pan American movement which has culminated in the present Organization of American States.

At the business meeting of the Society on Saturday morning, April 26, an informal report of the Committee on Study of Legal Problems of the United Nations was presented by Professor Louis B. Sohn, acting as chairman of the committee following the untimely death of Professor Clyde Eagleton, chairman of the committee, in January, 1958. The report discussed the domestic jurisdiction reservations to acceptance of the compulsory jurisdiction of the International Court of Justice and recommended that the United States withdraw its reservation.

The report of the Committee on Publications of the Department of

State and the United Nations was presented by Mr. Denys P. Myers, Chairman of the Committee, and after discussion the following resolution was adopted by the Society:

RESOLUTION ON DEPARTMENT OF STATE AND
UNITED NATIONS PUBLICATIONS

Whereas, The members of the American Society of International Law in their several capacities as students, publicists, teachers and practitioners require an accurate knowledge of foreign relations as professional men and women and as citizens; and

Whereas, Such accurate knowledge is available only as the Department of State of the United States and such institutions as the United Nations provide the records of their action through the publications they issue; therefore,

Be It Resolved by the American Society of International Law:

1. That the Society welcomes the publication of *American Foreign Policy, 1950-1955: Basic Documents*, and urges that present plans to continue the series annually be made a permanent policy of the Department of State;

2. That the full record of our diplomacy, as represented by the "Foreign Relations" series, be made available to the public as soon as possible, in accordance with the principles of "historical objectivity" as laid down in Regulation 045 of March 26, 1925, amended on October 31, 1955. It appears that problems of clearance are at present a serious obstacle to the publication and release of many volumes that are compiled. The Society urges the Department of State and other interested agencies, within the limits of national security, to follow a liberal policy of clearing the diplomatic papers in these volumes as expeditiously as possible, with a view to providing our public with the maximum possible information and thus promoting widespread understanding of our foreign policy in this critical era;

3. That in preparing a further *Digest of International Law* the high standard of scholarship established in the *Moore Digest of 1906* should be the criterion, and that the Department of State might usefully appoint a professional advisory committee with that end in view. The Society notes with satisfaction the progress made in assembling material and requests the Secretary of State to provide adequate personnel and funds for its immediate completion and publication of the new *Digest*;

4. That the Society again urges that provision be made for the resumption of compiling data and for publication of the indispensable *United States Treaty Developments*;

5. That the Society congratulates the United Nations Secretariat upon its notable progress in publishing the *Treaty Series* and notes that the program calls for publication of registered material within a year of its receipt, an aim to be realized in 1959;

6. That the Society deplores the delay in making promptly available the invaluable supplements to the *Repertory of the Practice of the United Nations Organs*;

7. That the Society welcomes the project to publish the judgments of the United Nations Administrative Tribunal, a volume which should take full cognizance of the prior League of Nations decisions in the same field;

8. That publication of the records initiated by the International Law Commission meets a real need, which should be further met by

publication of records of international conferences on both public and private international law held under the auspices of the United Nations;

9. That the Society does not understand that resolution 1203 (XII) calling for reduction of "documentation" by 25% applies in principle to United Nations records.

Upon the recommendation of the Committee on the Hudson Medal, the Society voted to award the medal in 1959 to Lord McNair for his outstanding achievements and contributions in the field of international law. The award will be conferred at the annual meeting of the Society next April.

The following officers were elected for the coming year:

Honorary President: The Honorable John Foster Dulles

President: Professor Myres S. McDougal

Vice Presidents: Professor Herbert W. Briggs, Mr. Herman Phleger, and Mr. Edgar Turlington.

The present Honorary Vice Presidents were re-elected, with the addition of Professor Robert R. Wilson, outgoing President of the Society.

Professor Brunson MacChesney was elected to the Executive Council to serve until 1960, filling a vacancy, and the following were elected to serve until 1961: Miss Ruth Bacon of the Department of State; Professor David R. Deener, Duke University; Professor Wolfgang Friedmann, Columbia University; Professor J. Eugene Harley, University of Southern California; Professor Sherman S. Hayden, Clark University; Mr. Charles S. Rhyne, President, American Bar Association; Professor William G. Rice, Wisconsin University Law School; and Mr. I. N. P. Stokes of the New York Bar.

The Committee on Nominations for the coming year was elected as follows: Professor Kenneth S. Carlston, Chairman; Dr. Martin Domke, Mr. Harry LeRoy Jones, Professor Louis B. Sohn, and Miss Marjory Whiteman.

The Executive Council of the Society at its meeting on April 26, 1958, elected the following officers: Honorable Edward Dumbauld, Secretary; Mr. Edward L. Merrigan, Treasurer; and appointed Miss Eleanor H. Finch, Executive Secretary and Secretary of the Board of Editors of the JOURNAL, and Mr. Denys P. Myers, Assistant Treasurer.

The Board of Editors was re-elected for the coming year, and three new members were added: Professors R. R. Baxter and Louis B. Sohn, of Harvard Law School, and Mr. James Nevins Hyde of the New York Bar. Professors Pitman B. Potter and John B. Whitton, and Mr. Edgar Turlington, previously active members of the Board, were elected Honorary Editors.

ELEANOR H. FINCH
Executive Secretary

JUDICIAL DECISIONS*

By BRUNSON MACCHESNEY

Of the Board of Editors

Tax treaties—liberal construction—tax on U. S. trustee for United Kingdom beneficiaries

AMERICAN TRUST COMPANY v. SMYTH. 247 F.2d 149.

U. S. Ct. A., 9th Circuit, July 8, 1957. Orr, Ct.J.

Plaintiff, as testamentary trustee, sued to recover capital gains tax paid under protest. All the beneficiaries of the trust were residents of the United Kingdom and not engaged in trade or business in the United States. They were not, however, entitled to current income under the trust. Defendant claimed on the basis of U. S. tax law that the plaintiff was taxable on the capital gain made in 1946. Construing Article XIV of the 1946 Convention between the United States of America and the United Kingdom, the lower court found for defendant. 141 F.Supp. 414 (U. S. Dist. Ct., N.D., Calif. S.D., June 4, 1946, Carter, D.J.), noted in 51 A.J.L.I. 123 (1957). Reversing the decision below, the court held¹ in part:

... The problem for solution is: was the capital gain here involved exempt from United States income tax by virtue of Article XIV of the Income Tax Convention between the United States and the United Kingdom of Great Britain and Northern Ireland, signed April 10, 1945, effective January 1, 1946, 60 Stat. 1377, hereafter the "Treaty."

Article XIV of the Treaty provided:

"A resident of the United Kingdom not engaged in trade or business in the United States shall be exempt from United States tax on gains from the sale or exchange of capital assets."

It is agreed that the beneficiaries were not engaged in trade or business in the United States during 1946.

Section 22(b) (7), Internal Revenue Code of 1939, 26 U.S.C.A. § 22(b) (7), provided:

"(b) Exclusions from gross income. The following items shall not be included in gross income and shall be exempt from taxation under this chapter: * * *

"(7) Income exempt under treaty. Income of any kind, to the extent required by any treaty obligation of the United States."

The following Treasury Regulation was in force and effect in 1946:

"Sec. 7.519 Exemption from, or reduction in rate of, United States Tax in the Case of Dividends, Interest, Royalties, Natural Resource Royalties, and Real Property Rentals.

* * * * *

Beneficiaries of an estate or trust.—A non-resident alien who is a resident of the United Kingdom and who is a beneficiary of

The assistance of Hardy C. Dillard of the Board of Editors on the Commonwealth aspect is gratefully acknowledged.

¹ Footnotes omitted.

a domestic estate or trust shall be entitled to the exemption, or reduction in the rate of tax, as the case may be provided in Articles VI, VII, VIII, IX, and XIV of the convention with respect to dividends, interest, royalties, natural resource royalties, rentals from real property, *and capital gains to the extent such item or items are included in his distributive share of income of such estate or trust* if he is taxable in the United Kingdom on such income and is not engaged in trade or business in the United States through a permanent establishment. * * *'' (Italics supplied.)

The Government contends that while the Treaty exempts the capital gains tax on the distributive share of the British beneficiaries, it does not extend the exemption to the trust which, it is urged, is a separate taxable entity under the Internal Revenue Code. The Government's argument is bottomed upon the theory that the capital gain resulting from the sale of trust property was not income of the beneficiaries and remaindermen of the trust, but was income taxable to the trustee. In an attempt to sustain this theory, resort is had to the domestic scheme of taxation in the United States where a trust is conceded to be a distinct taxable entity, subject to taxation upon income which is not currently distributable to the beneficiaries.

Appellant concedes that were it not for the Treaty provision, this argument might be entirely proper, but insists that Article XIV of the Treaty controls and by its terms exempts not only the tax on the capital gain upon the British beneficiaries, but also the tax upon the trust retaining the gain, notwithstanding absence of a current distribution.

We conceive the purpose of the Treaty to have been full reciprocity and equality of tax treatment between nationals of the United States and the United Kingdom. Such being the case, this purpose requires a broad construction of Article XIV, so as to relieve the British beneficiaries from the burden of the capital gains tax to the same extent, in a given situation, as a United States beneficiary would be in a similar position in the United Kingdom.

A broad, equitable purpose of the Treaty to exempt capital gains from taxation when a United Kingdom resident would otherwise sustain the burden of the tax directly or indirectly should be given effect without regard to our domestic scheme of taxation, in which the interposition of a bare legal title in the trustee is considered a separate taxable entity. A treaty, being a compact between two sovereigns, must be construed broadly to accomplish the intent of the contracting parties. Such an intent is not consonant with the Government's position in this case. . . .

[Quotations from *Hauenstein v. Lynham*, 100 U. S. 483, and *Factor v. Laubenheimer*, 290 U. S. 276, omitted.]

This is also true as to the Income Tax Convention, its purpose being to secure reciprocity and equality of tax treatment between the nationals of the two contracting parties. The Income Tax Convention between the United States and the United Kingdom has the status of a treaty, and consequently, is "the supreme Law of the Land." U. S. Const. art. VI, cl. 2.

In construing the terms of the Treaty, we are constrained to look "within the four corners of the Treaty" keeping in mind the purpose of the contracting parties. Any resort to domestic law must be derived from the express terms of the Treaty itself. Article II(3) of the Treaty provides:

"In the application of the provisions of the present Convention by one of the Contracting Parties any term not otherwise defined shall, unless the context otherwise requires, have the meaning which it has under the laws of that Contracting Party relating to the taxes which are the subject of the present Convention." The precise provisions of Article XIV, viz: "resident of the United Kingdom" is specifically defined by the Treaty; "gains from the sale or exchange of capital assets" has a special meaning derived from both statute and judicial decision in United States tax law. But "exempt" is nowhere defined in the Treaty, nor in the Internal Revenue Code of 1939. Therefore, we are required to construe the term "exempt" in accordance with what we believe to be the intent of the contracting parties, in order to achieve reciprocity between similarly situated United States and United Kingdom taxpayers.

We think "exempt" was employed in its broadest meaning, signifying a release from economic burden. If the capital gains tax is imposed on the trust in the instant case, the United Kingdom beneficiaries and remaindermen are burdened economically with the United States tax, as it diminishes both their respective incomes and corpus distributions.

We are not persuaded that the contracting parties intended such an economic burden be placed on United Kingdom taxpayers, when in a similar situation a United States income beneficiary or remainderman would not have a similar burden arising from United Kingdom taxation.

A study of the Articles of the Convention indicates an attempt to achieve a thoroughgoing reciprocity between the two nations' taxpayers in similar situations. Upon its face Article XIV does not portray any concession by the United Kingdom. The policy of reciprocity is apparent, however, when it is realized that the United Kingdom does not impose an income tax upon capital gains; it is obvious there was no occasion for any express concession on this point by it.

The exemption found in Article XIV is not solely limited to a United Kingdom resident who would report and pay the tax. A analogous situation occurs when a United Kingdom resident holding legal title to a capital asset located in the United States sells it at a gain; in such a situation there is no question but that he would be exempt under Article XIV. Then, if the broad and overriding intent of the contracting parties to achieve reciprocity is to be given effect, how can a distinction reasonably be made where the United Kingdom resident has equitable ownership?

The Government's contention that the trust is a separate taxable entity under domestic law and hence not a resident of the United Kingdom, is rather finely drawn and entirely overlooks the evident purpose of the Treaty. The phrase "A resident of the United Kingdom" found in Article XIV, and defined in Article II(1) (g), does not refer to concepts of tax entities under American domestic tax law. The relevant concept is the economic burden upon the individual taxpayer, and the chief purpose of the Treaty is relief from the economic burden of double taxation. The Proclamation preceding the Treaty, which reads:

"Desiring to conclude a Convention for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income, * * *

sustains our conclusion.

Article XIV exempted the tax upon the capital gain to the trust. The intervention of a trust and trustee having legal title did not contradict the pattern of reciprocal taxation and impose an unintended economic burden.

The fact that the Income Tax Convention between the United States and the United Kingdom does not contain a "savings clause" found in sixteen of twenty Tax Conventions negotiated by the United States is significant. Treaties containing the usual "savings clause" were negotiated both before and after the United Kingdom Treaty. The purpose of the "savings clause," as we read it, was to make plain that the United States reserved the right to include all items of income taxable under its revenue laws. Hence, were we here dealing with a treaty containing a savings clause, a different result might possibly be reached. Thus, it seems that the savings clause was incorporated into certain treaties with the express purpose of limiting exemptions. Its omission from the United Kingdom Treaty is further evidence of a purpose to exempt completely income from capital gains belonging to residents of the United Kingdom, regardless of where lodged between the time of receipt and distribution. . . .

Trading with the Enemy Act—1951 Joint Resolution of Congress terminating war with Germany—standing to sue

FARBENFABRIKEN BAYER, A.G. v. STERLING DRUG, INC. 251 F.2d 300. U. S. Ct. A., 3rd Circuit, Jan. 2, 1958. Biggs, C.J. Certiorari denied May 19, 1958.

Plaintiff, a German corporation, brought action against defendant American corporation for alleged breach of contract occurring in 1941, or shortly thereafter, and prior to January 1, 1947. The claims on which action was brought were subject to seizure and vesting under the Trading with the Enemy Act of 1917.¹ Defendant's answer alleged as an affirmative defense the express limitation in House Joint Resolution No. 289, approved October 19, 1951.² In the District Court, the defendant's motion for judgment was denied and the action dismissed without prejudice. 148 F.Supp. 733 (U. S. Dist. Ct., D. N.J., Feb. 5, 1957. W. F. Smith, D.J.), digested in 51 A.J.I.L. 639 (1957). In reversing the judgment below, the court said in part: ³

The plaintiff, Farbenfabriken Bayer A. G. (Farben), a corporation organized under the laws of the Federal Republic of West Germany, a former enemy alien within the meaning of Section 2(a) of the Trading with the Enemy Act, 50 U.S.C.A., App. § 2(a), seeks an accounting and other relief against Sterling Drug, Inc. (Sterling), basing its claims on alleged breaches of a cartel agreement, occurring in 1941 or soon thereafter. These claims, choses-in-action, constitute "property" within the meaning of the Act, *Propper v. Clark*, 337 U. S. 472, 480 (1949), and were not seized by the Alien Property Custodian though subject to seizure and vesting under Section 5(b), 50 U.S.C.A. App. § 5(b). Sterling contends that Farben has no right to "institute or maintain" its action, in view of the limitation or

¹ 50 U.S.C.A., Appendix, § 1 *et seq.*

² 65 Stat. 451, 46 A.J.I.L. Supp. 13 (1952).

³ Footnotes omitted.

reservation contained in Joint Resolution No. 289, 65 Stat. 151, approved October 19, 1951, 50 U.S.C.A. App. XX. Sterling moved for judgment on the pleadings under Rule 12(c) and for summary judgment under Rule 56(b), Fed. R. Civ. Proc., 28 U.S.C. The Court below agreed with Sterling that Farben could not maintain its suit but did not concur in Sterling's view that it was entitled to a judgment on the merits under the rules cited and therefore dismissed the action without prejudice to Farben to institute and maintain a new action when the disqualification deemed by the court to have been imposed by Executive Order No. 8389, April 10, 1940, 5 Fed. Reg. 1400 as amended, Executive Order No. 8785, June 14, 1941, 6 Fed. Reg. 2897, pursuant to Section 5(b) of the Act has been removed. See 148 F. Supp. 733 (1957).

. . . Following the enactment of the Joint Resolution President Truman on October 24, 1951 proclaimed a termination of the state of war with Germany. Proc. 2950, 16 F. R. (Oct.), p. 10,915.

Farben has advanced several theories under any one of which it asserts that it is entitled to maintain the present action. We will discuss its principal contention only for we deem it to be dispositive of the appeal. Put briefly, Farben's principal argument is that the Joint Resolution and the Presidential Proclamation gives it *locus standi* in the court below and entitles it to maintain the suit even if it be the fact that its property under the Joint Resolution still remained subject to vesting and seizure. Sterling asserts that the "status" of the property under the Joint Resolution remains the same as when Farben was an enemy alien and since as an enemy alien it was unable to maintain a suit in our courts, it cannot do so now. We cannot agree.

Our primer in resolving the controversy is, of course, the Trading with the Enemy Act, as amended. We need not discuss the provisions of the Act at length for its purposes and its application are too well known. It is sufficient to state here that it authorized the President to sequester or seize property of enemy governments or enemy aliens *inter alia*, as defined by Section 2, to the end that the United States might successfully prosecute all objects of war. *United States v. Chemical Foundation*, 272 U. S. 1 (1926); *Kochler v. Clark*, 170 F. 2d 779 (9 Cir. 1942). See Dulles, The Vesting Powers of the Alien Property Custodian, 28 Cornell L.Q. 245 (1943). See also the First War Powers Act, 55 Stat. 839 (1941), 50 U.S.C.A. App. Title III, amending Section 5(b) of the Trading with the Enemy Act. It is agreed that Farben was an enemy alien. It is also agreed that the property, the choses-in-action, which are the subject of this suit were never seized.

Nothing in the Act prohibits an enemy alien from maintaining a suit in our courts. In respect to the bringing of suits Section 7 (b) of the Act provides in pertinent part: "Nothing in this Act shall be deemed to authorize the prosecution of any suit or action at law or in equity in any court within the United States by an enemy or ally of an enemy prior to the end of the war. . . ." In short Congress in respect to an enemy maintaining a suit within the United States was content to rely on decisional or common law. The early rule of law, sometimes referred to very generally as "the common law rule," that the King's subjects had a duty to plunder the King's enemies subsequently modified to a prohibition, personal to an enemy, that an enemy he could not maintain a suit, discussed in *Petition of Bernheimer*, 130 F. 2d 396 (3 Cir. 1942), has been so altered that the Supreme Court has stated that "the sole objection to giving judgment

for an alien goes only so far as it would give aid or comfort to the other side." *Ex Parte Kawato*, 317 U. S. 69 (1942), quoting in part from *Berge-Forbes Co. v. Heve*, 251 U. S. 323.

We are somewhat troubled by the statement in *Kawato* that "Section 7 bars from the courts only an 'enemy or ally of an enemy,'" 317 U. S. at p. 75, but we are of the opinion that a failure to authorize a suit is a bar to suit when the strict common law rule that an enemy cannot maintain a suit in our courts is in effect, and that this is what the Supreme Court had in mind. Cf. *Ex Parte Colonna*, 314 U. S. 510 (1942), wherein it was stated *per curiam* by the Supreme Court refusing leave to file a petition for writs of mandamus and prohibition to be issued to this court: "This provision [Section 7(b)] was inserted in the Act in the light of the principle, recognized by Congress and by this Court, that war suspends the right of enemy plaintiffs, to prosecute actions in our courts." It follows that we must hold that though the property choses-in-action, was available to Farben prior to the declaration of war between the United States and Germany on December 11, 1941, 55 Stat. 796, upon the declaration of a state of war by Congress on that date, the right of Farben to institute suit was then suspended. The disability caused by the suspension was a personal one as we have stated. It was not a substantive failure of the causes of action. They continued to exist but could not be sued upon in a court in the United States.

On December 31, 1946, the President proclaimed the cessation of hostilities of World War II. See Proclamation 2950, *supra*. Then came the enactment of the Joint Resolution of October 19, 1951 with which we are concerned and Proclamation 2950 by the President followed it by four days. Whether or not Farben could have maintained its suit during the period from December 31, 1946 to October 19 or 21, 1951, is a question with which we need not concern ourselves for the suit at bar was commenced on September 28, 1955.

We are of the opinion that Farben is entitled to maintain its suit. The purpose of the Joint Resolution and its proviso is made very clear by its legislative history. The Joint Resolution was enacted at the request of the President. The Senate Report, Sen. Rept. 892, 82nd Cong., 1st Sess., Para. 8 (1951) refers to the Presidential message, quoting from it the reason for the President's request. This was that it was necessary to retain control of German property already vested and possibly to vest other German property, even though the war had terminated.

Congress intended to terminate the state of war so as to remove the disqualifications of German nationals as enemies but deemed it necessary to make certain that the President should retain the right to vest certain German property. The proviso of the Joint Resolution was designed to effect this end; a result which was deemed to be in doubt "unless expressly provided for in new legislation." The terms of the proviso were held to effect the result intended. *Ladue & Co. v. Brownell*, 220 F. 2d 468 (7 Cir. 1955). In brief it was the intention of Congress to effect peace between the Federal Republic of West Germany and German nationals and the United States and to restore the normal rights and relations ordinarily in effect between friendly peoples but to retain and obtain control of Germanic property in the United States under Section 5(b) of the Act where necessary. We have no doubt the legal effect of the Joint Resolution and the Proclamation engrafted on the Trading with the Enemy Act was to wipe out the suspension of the right of a German national to bring suit in the United States.

The error of the court below lies, we believe, in its approach to the term "status" as employed in the Joint Resolution. While the court properly held that property of a former German enemy alien was subject to vesting and seizure at the will of the Executive, the primary concern of both the President and the Congress was with the power of the Executive to vest property and not with access to courts in the United States. The term "status" is properly used in respect to a person's relationship to property, *viz.*, ownership of property or a right to possess property. The proviso deals with ownership in or a right to property. The right to bring a suit, to access to a court may not be described properly as a status. It is a general right of a person, not of a substantive character. One does not say that a plaintiff possesses the status to bring a suit. He either has a right to maintain a suit or he does not but his right of access to a court is a personal qualification and is not a *status*.

We conclude therefore that Farben is entitled to maintain its suit and, if the nature of its causes of action and the evidence permit, to secure judgment in the court below. Beyond this the way is pointed out by *Zittman v. McGrath*, 341 U. S. 446, 449-552 (1951), which held that attachment levies against American holders of claims against German banks were not nullities though, of course, transfer of the funds could not be effected without a license. See *Propoer v. Curran*, 337 U. S. 472 (1949), *Orvis v. Brownell*, 345 U. S. 183 (1952). Mr. Justice Douglas's dissenting opinion *id.* at p. 191, and *Polish Republic v. Banca Nazionale Rumani*, 288 N.Y. 332, 43 N.E. 2d 345 (1942). In *Zittman* the claims had been vested in the Alien Property Custodian, while Farben's claims have not been seized. Public Circular No. 3, 8 C.F.R. § 511.331(d), throws light upon the problem confronting us. This explains the purpose of General Ruling No. 12, 8 C.F.R. § 511.212, promulgated pursuant to Section 5(b) of the Trading with the Enemy Act. In pertinent part Section 511.212(d) states that the Treasury does not desire to interfere with litigation concerning enemy aliens "so long as it is clearly understood that judicial process cannot, without a license or other authorization from the Secretary of the Treasury, operate to transfer or create any interest in blocked property." In so holding we assume *arguendo* that Farben's claims are still blocked or frozen by Executive Order 8389 as amended by Executive Order 8785 and General Rule No. 12. We need go no further to dispose of the appeal at bar for Farben may not secure judgment against Sterling. If Farben should secure a judgment against Sterling and then seek execution on the judgment, it will be necessary for the court below to determine whether General License No. 101, Section 511.101, 8 C.F.R. (Com. Supp.) has freed Farben's claims then reduced to judgment. . . .

Taxation—interest in property in foreign government—use for public purpose

FRASER-BRACE OVERSEAS CORP. *v.* ST. JOHN. 9 D.L.R. 2d 391.
New Brunswick Sup. Ct., May 9, 1957. Bridges, Richard and Jones, JJ.

Certain real and personal property in the possession of appellant was assessed for municipal taxes. Appellants had a contract with the United States to construct a series of radar installations extending from New-

foundland westward across Canada, as a part of a continental defense system known as the Pine Tree Line.* The contract provided that title to all property purchased by the contractor, for which the contractor was entitled to be reimbursed as a direct cost, should vest in the United States upon delivery by the vendor and title to all other property, the cost of which was reimbursable under the contract, should vest upon the commencement of its use in the performance of the contract. Furthermore, title to such property was not to be affected by affixation to any realty. Thereupon, the contractor leased property and built temporary office and radio facilities thereon. The construction was pursuant to the contract and the materials were procured on purchase order forms supplied by the United States. One building was occupied by U. S. Government officials. Appellant never used any of the buildings for any other contracts.

On appeal, appellants were held properly taxable on their interest in the premises and the buildings because they had legal title as trustees of the United States Government. Though the buildings were constructed from materials the title to which had vested in the United States under the contract, the contract clause denying loss of title by affixation to realty was binding only between the parties and not as to the taxing authorities who were empowered under clause (h) of s. 1 of the *Rates and Taxes Act* to tax buildings affixed to the soil. However, the contractor acquired no proprietary rights in the personal property, as such property was wholly owned by the United States and was being used for public or national purposes. Accordingly, it was immune from municipal taxation.

Richard, J., for the court, found no analogy to *Holroyd v. Marshall* (1862), 10 H.L.C. 191, 11 E.R. 999, as in the instant case the contractors did not acquire the personal property for their own account so as to have a beneficial interest, but solely for the account of the United States Government. In regard to the exemption of the personal property, Richard, J., stated:

Could the United States have been assessed for such personal property? Could the United States as owners have claimed immunity from taxation? The criterion is whether such personal property was owned and being used in Canada by the United States, a foreign power, for public or national purposes. There cannot be very much doubt that the chain of outposts across the northern part of Canada was for the national defence of the whole of America. The evidence is to the effect that the goods warehoused in Saint John were materials and supplies destined to the construction of such defences. That they were in the possession of either Fraser-Brace or Drake-Merritt contractors for the construction of such defences is to my mind immaterial. As such contractors, they were the mere agents of the United States and their role was in no way different than had such goods been in the possession of the army personnel of the United States and no doubt some of this property, such as motor vehicles and office equipment was used by such personnel, part of the buildings being used by them. By the same token I cannot draw any distinction between materials which went directly into the construc-

* This line is not to be confused with the DEW Line which is nearer the Arctic (DEW designates Distant Early Warning).—Ed.

tion of these defence outposts, and the other personal property such as office and radio equipment as well as motor vehicles which were as necessary as machinery for the carrying out of the works which were being done. This personal property was neither for the convenience nor for the personal benefit of the contractors and it was so far removed from the site of the actual construction, geographical conditions made it necessary that such property be kept in a place such as was maintained in New Brunswick.

When does a foreign Sovereign possess immunity from suit or legal proceedings in a foreign country? What is the basis for such immunity and why, and where is such immunity recognized? For circumstances under which the principle has been applied are stated in *Baccus S.R.L. v. Servicio Nacional del Trigo*, [1956] 3 All E.R. 715.¹ This case, not exactly in point with the present matter, nevertheless illustrates the situations and conditions where immunity from legal process has been invoked by a foreign Sovereign and where, notwithstanding that it might appear such immunity may have been waived or lost, yet the principle has been applied because the foreign Sovereign is the only one who can forego such immunity (p. 413.)

Bridges, J., dissenting with respect to granting immunity to the personal property, stated:

It was not being used by the United States Government for public or national purposes but by Fraser-Brace in the performance of a contract. To hold the personal property exempt on the ground of sovereign immunity would I think be too great an extension of the doctrine. In the cases in which it has been held to apply, the property has, I think, been under the control or in the possession of the foreign state or a Department thereof which it was not when the assessments in question were made. (p. 399.)

The refusal of the court to extend immunity to the real property was based by Richard, J., on a title analysis, since the evidence indicated the title was vested in appellants (pp. 406, 407).

Bridges, J., after discussing a number of familiar cases, indicated that in his opinion the realty was not destined to the public use of the United States Government, nor was it being used for substantially national or public purposes of the United States. Any other buildings suitably located could have served the purpose, and once vacated the buildings were put to no use by the United States Government. They were, in fact, turned over to Crown Assets Corp. of Canada (pp. 398-399).

Aliens- detention by immigration officials at airport—'habeas corpus' interpreted- false imprisonment—damages

KUCHENMEISTER v. HOME OFFICE AND ANOTHER. [1958] 1 All E.R. 185.

Queen's Bench Div., Jan. 27, 28, 29, 1958. Barry, J.

Plaintiff was a German citizen living in Dublin. During World War II he had been interned in England and upon his release was listed as one

¹ This case is noted in 51 A.J.L.L. 427 (1957). Appeal to the House of Lords pending.

whom immigration authorities were to refuse leave to land in England. In April, 1955, plaintiff decided to visit the Hanover Trade Fair and for this purpose booked air passage via K.L.M. from Dublin to Amsterdam. On his return flight, he was informed that his plane would land at London Airport where through passengers to Dublin would be transferred to Aer Lingus. The London Airport is in two sections—northern and central—separated by a distance of approximately one mile with no physical controls preventing egress from the perimeter of the airport. Prior to embarking at Amsterdam, plaintiff had been told that no English visa would be required; furthermore, landing cards were not issued to through passengers to Eire upon landing at the London Airport. The K.L.M. plane landed at the London Airport (northern section) at 6 p.m. on April 27; the flight to Dublin was to leave at 8:45 p.m. (central section) the same evening. Plaintiff missed this flight because he was detained by immigration officials in the northern section of the airport for approximately two and a half hours while checking on his status. The Aliens Restriction Act of 1914, as amended in 1919, conferred on the Crown power to impose various restrictions on aliens. The Aliens Order 1953, made pursuant to this authority, provided in Article 1 that landing in the United Kingdom should not be effected except with the leave of an immigration officer. An exception was contained in Article 2 covering temporary landings. Article 2 (1) (b), on which plaintiff rested his case, provided that leave to land shall not be required:

. . . (b) in the case of an alien who lands from an aircraft at an approved port for the purpose only of embarkation in an aircraft at the same port, and remains throughout the period between his landing and embarkation, within such premises or limits as may be approved for the purpose by an immigration officer.

Paragraph (2) of Article 2 further provided, however, that:

Notwithstanding anything in para. (1) of this article, an immigration officer may at anytime—(a) give notice to an alien who is for the time being on board a ship or aircraft prohibiting him from landing without leave thereunder; or (b) grant or refuse leave to land to an alien who is within the United Kingdom after landing without leave thereunder; and thereupon the said para. (1) (of art. 2) shall cease to apply to the alien.

In an action for false imprisonment, the court held that plaintiff's detention was illegal because, although Article 2 (1) (b) conferred a certain discretion on immigration officials as to the premises on which aliens might remain, it could not be exercised so as to frustrate the purpose of paragraph (b), which allowed aliens to land without leave for purposes of embarking on another aircraft. Furthermore, if the immigration authorities apprehended danger in allowing the alien to land, their remedy was to refuse leave to land under Article 2 (2) which had not been done.

The court stated:

I have indicated that no express powers of detention are conferred under art. 2 (1) (b). Counsel for the plaintiff has rightly conceded

the immigration officials would be entitled to a reasonable time in which to satisfy themselves that the alien who arrived at the approved port really did intend to embark in an aircraft at the same port. If the immigration authorities' inquiries had been confined to that question and they had been completed within a reasonable time, the plaintiff would have raised no complaint: certainly counsel disclaimed any suggestion that he would raise any complaint on the plaintiff's behalf. "Whatever view one takes of this case, on the interpretation of the law which I now adopt, I cannot see that this delay of nearly two-and-a-half hours could possibly be regarded as reasonable. It is wrong as to my view of the law, then of course no question as to a reasonable time arises, because the plaintiff has never been unlawfully detained. On the law as I understand it, therefore, the plaintiff is entitled to recover damages. (p. 493.)

On the question of damages the court stated:

"The plaintiff does not ask for an extravagant figure, but, on the other hand, it would be quite wrong for the court to award a contemptuous figure. No pecuniary damage has been suffered, but the very precious right of liberty, which is a right available to everyone who can for the time being be regarded as a subject by local allegiance of Her Majesty, is one which must be protected. Doing the best I can, I think that a fair figure which will vindicate the plaintiff's rights without amounting to a vindictive award would be a sum of £150. I need hardly say that I should have felt fully entitled to increase that amount to a very great extent if there had been any suggestion here that the plaintiff was being ill-treated by any of the officials concerned. I am quite satisfied that all the officials genuinely considered that they were doing the best possible thing in difficult circumstances, and in my judgment no blame of any kind rests on them. (p. 493.)

NOTES

Admiralty—Jones Act—Workmen's Compensation injury to pile driver working on "Texas Tower"—fact question of being a "seaman" for jury

The decision below, noted in 52 A.J.L.L. 135 (1958), holding plaintiff not to be a "seaman" under the Jones Act,¹ was reversed, *Per Curiam*, on the ground that the evidence presented a basis for a jury finding that plaintiff was "a member of a crew." The Court agreed with the Court of Appeals that the Defense Bases Act² did not provide the exclusive remedy. Justice Frankfurter thought certiorari should not have been granted. Justices Harlan and Whittaker dissented on the jury question. *Grimes v. Raymond Concrete Pile Company*, 356 U. S. 252 (Sup. Ct. April 7, 1958, *Per Curiam*).

Sovereign immunity—procedure for claiming—Trading with the Enemy Act

Plaintiff sought to attach fund vested in Alien Property Custodian as incident of a suit against the Italian Government for legal services. *Per*

¹ 46 U.S.C.A. § 688.

² 42 U.S.C.A. §§ 1651, 1654.

suant to a Joint Resolution of Congress¹ authorizing return of property which belonged to the Italian Government or Italian nationals, the Attorney General had published notice of intent to return the fund under Section 32 (f) of the Trading with the Enemy Act² which states in part:

. . . the property or interest or proceeds specified shall be subject to attachment at the suit of any citizen or resident of the United States . . . in the same manner as property of the person to whom return is to be made. . . .

On appeal, it was held that there was no jurisdiction to attach the fund. Under § 32 (f), the property is treated as that of the returnee. Since the returnee is the Italian Government, the property is immune unless there was consent or waiver. Nothing in the Treaty of Peace³ constituted consent or waiver to private suit. § 34 of the Act is made the exclusive remedy against vested funds. Immunity, therefore, applies in any other action. No official suggestion of immunity is required when there is no question of fact as to ownership of the property. *Loomis v. Rogers, Attorney General, et al.* (U. S. Ct. A., Dist. of Col., March 6, 1958, *Per Curiam*).

Admiralty—conflict of laws—cargo damage—contract providing for dispute to be settled in foreign court and to be governed by foreign law—discretion to allow proceedings in England

In *The Fehmarn*, [1957] 1 All E.R. 333 (Court of Appeal, December 16 and 17, 1957, Lord Denning, Hodson and Morris L. JJ.), the decision of Willmer, J., in the Probate, Divorce and Admiralty Division was upheld and leave to appeal to the House of Lords was refused. The Court of Appeal upheld the jurisdiction of the Admiralty Court by virtue of the Administration of Justice Act, 1956 s. 1 (1) (g). It further declared that the Court should not stay proceedings, since a stipulation that all disputes shall be judged by a foreign tribunal, while it is one to which the courts will normally give effect, is yet subject to the overriding principle that no one, by his private stipulation, can oust the English courts of jurisdiction in a matter that properly belongs to them. The dispute, which was between English cargo-owners and German shipowners, properly belonged to the English court, since it was more closely connected with England than with Russia (the designated forum). Furthermore, the shipowners apparently did not object to the dispute being decided in England, but merely wished to avoid giving security demanded by the cargo-owners as a substitute for arresting the ship.

The case in the lower court is noted in 52 A.J.I.L. 133 (1958).

Admiralty jurisdiction—tort on shore

In *Castillo v. Argonaut Trading Agency*, 156 F. Supp. 398 (U. S. Dist. Ct., S.D.N.Y., May 17, 1957, Dimock, D.J.), it was held that not "physical

¹ 61 Stat. 784.

² 50 U.S.C.A. App., § § 1-40 (1952).

³ 61 Stat. 1245; 42 A.J.I.L. Supp. 47 (1948).

company' but the nature and relation of acts to maritime concerns are determinative of admiralty jurisdiction in tort.

Jurisdiction—admiralty—Jones Act

Suit was filed under the Jones Act¹ and for unseaworthiness and maintenance and cure on the civil side of the Federal court by plaintiff seaman of Danish nationality against Danish corporations, owners of ship of Danish registry on which plaintiff was injured in United States waters. It was held no claim was stated under the Jones Act and that, since being absent, other claims would be transferred to the admiralty side for discretionary disposition. *Hansen v. A.S.D.S.S.V. Endborg*, 148 F. Supp. 387 (U. S. Dist. Ct., S.D.N.Y., Oct. 9, 1957, Dawson, D.J.). See also, *Atencio S. v. The S.S. Ciudad de Bogota*, 155 F. Supp. 590 (U. S. Dist. Ct., S.D.N.Y., Oct. 30, 1957, Edelstein, D.J.).

Jurisdiction—admiralty—service of process—garnishment

Suit was filed by a seaman against a Panamanian corporation. *In personam* service with foreign attachment was sought by serving attorney for English underwriters, defendants in another pending suit in which the Panamanian corporation was plaintiff. On motion to set aside, it was held that the authority of attorneys was limited to the other suit so that English underwriters were not present, and service was not sufficient to secure jurisdiction over underwriters as garnishees. *Monteiro v. Sociedad Mar. San Nicolas, S. A.*, 155 F. Supp. 382 (U. S. Dist. Ct., S.D.N.Y., Oct. 11, 1957, Dawson, D.J.).

Constitutional law—right to fair trial—dismissal of Government suit for failure to issue passport valid for travel to Communist China and North Korea to interview witnesses

Defendants were indicted for allegedly engaging in seditious activities during Korean War through publication of charges of United States aggression, waging of bacteriological warfare, blocking peace, and falsifying of casualties. Defendants sought to disprove through testimony of witnesses in Communist China and North Korea. The court held the indictment would be dismissed unless the United States validates passport of defense counsel for travel to Communist China and North Korea. *United States v. Powell*, 156 F. Supp. 526 (U. S. Dist. Ct., N.D. Calif., S.D., Nov. 1, 1957, Goodman, D.J.).

Customs—most-favored-nation clause—General Agreement on Tariffs and Trade—Agricultural Adjustment Act

Plaintiff, importer of tung oil from Paraguay, sought an injunction to prevent the Collector of Customs from refusing entry. One shipment had arrived but had not been entered and another shipment was en route

¹ 46 U.S.C.A. § 688, 41 Stat. 1007.

when a Presidential Proclamation, pursuant to Section 22 of the Agricultural Adjustment Act¹ became effective on September 9, 1957. On April 9, 1947, an International Trade Agreement² between the United States and Paraguay became effective. It contained most-favored-nation clauses with respect to customs duties and restrictions on imports. It contained also an escape clause permitting withdrawal of concessions in emergencies threatening serious injury to domestic producers. The United States, but not Paraguay, became a party on October 30, 1947, to the General Agreement on Tariffs and Trade,³ Article XIII, subdiv. 3(b) of which provided an exception to quota proclamations for *en route* shipments. Plaintiff claimed Paraguay was entitled to this exception by virtue of the most-favored-nation clauses. The court held the language of the clause in question did not cover quotas. Furthermore, the Presidential Proclamation made no exception for *en route* shipments, and the Agricultural Adjustment Act, on which it was based, being later in time, would prevail over the agreement with Paraguay. *C. Tennant Sons & Co. of New York v. Dill*, 158 F.Supp. 63 (U. S. Dist. Ct., S.D.N.Y., Dec. 16, 1957, Levet, D.J.).

Jurisdiction—civilian employee of armed forces abroad—Constitutionality of trial abroad under Code of Military Justice

Civilian employee, who was attached to armed forces of the United States at a Moroccan base and was convicted by court-martial there of conspiring to commit larceny, sought *habeas corpus* on the ground of denial of his Constitutional rights to indictment by a grand jury and trial by jury. The court held that administrative remedies did not need to be exhausted and that Article 2 (11) of the Uniform Code of Military Justice⁴ as applied to a civilian employee attached to the armed forces abroad was Constitutional. *United States v. McElroy*, 158 F.Supp. 171 (U. S. Dist. Ct., Dist. of Col., Jan. 13, 1958, Holtzoff, D.J.).

Probate—reciprocity as condition of inheritance under State law

In review of probate proceedings of California decedent in which legatees residents in Soviet Union claimed defects, it was held that non-resident aliens cannot inherit or object to defects unless proof of reciprocity in rights of inheritance has been made. *In Re Nersisian's Estate*, 318 Pac. 2d 168 (Dist. Ct. of Appeal, 2d Dist., Div. 1, Calif., Nov. 27, 1957, Drapeau, protem.).

Indian tribes—eminent domain—recognized title—standing to sue

The decision in *St. Regis Tribe of Mohawk Indians v. State*, noted in 51 A.J.I.L. 646 (1957), was reversed by the Appellate Division on the grounds that there was no showing of legal title in claimants and that the

¹ 7 U.S.C.A. § 624.

³ T.I.A.S., No. 1700.

² 61 Stat., Pt. 3, p. 2688 *et seq.*

⁴ 10 U.S.C. § 802 (11).

debt had been released and discharged. *St. Regis Tribe of Mohave Indians v. State*, 168 N.Y.S. 2d 894 (Sup. Ct., App. Div., 3d Dept., N.Y., Dec. 19, 1957, Bergan, J.).

Estate taxes—power to enforce foreign revenue laws

Decedent was United States citizen who died while resident and domiciled in England. United States estate taxes were paid. There was a deficit of \$10,000 in funds available in England to pay British death duties assessed on assets in both countries. In a proceeding to settle account and application for instructions with respect to making payment available to pay British death duties, the court held there was no power in absence of reciprocal agreement, to enforce revenue laws of another jurisdiction, nor did comity impose such a duty. *In Re McNeel's Estate*, 170 N.Y.S. 2d 893 (Surrogate's Court, N. Y. County, Dec. 20, 1957, Cox, S.).

Warsaw Convention—timeliness of claim

Plaintiff brought action to recover for loss of part of cargo of truck shipped from India to Detroit via London and New York through connecting carriers. It was held that the Warsaw Convention¹ applied; that plaintiff, although not the consignee, was the real party in interest in the air waybill and could sue; and that failure to file a damage claim within seven days as provided in the convention was ground for dismissal. Furthermore, even if the claim was treated as one for partial loss, it was too late. *Parke, Davis and Co. v. British Overseas Airways Corp.*, 133 N.Y.S. 2d 385 (City Court of New York, Jan. 30, 1958, Harold Bay, J.).

Kingdom of Hawaii not a "foreign government" within statute prohibiting counterfeiting

U. S. v. 3,827 Coins, 144 F. Supp. 740 (U. S. Dist. Ct., D. Hawaii, Wigg, D.J.) so holding, noted in 51 A.J.I.L. 431 (1957), was affirmed *sub nomine United States v. Gertz*, 249 F.2d 662 (U. S. Ct. A., 9th Cir., Nov. 25, 1957, Hankey, Ct.J.).

Passports—requirement of non-Communist affidavit

In *Dayton v. Dulles*, noted in 51 A.J.I.L. 645 (1957), and in *Briehl v. Dulles* and *Kent v. Dulles*, noted in 52 A.J.I.L. 345 (1958), certiorari has been granted. 75 S. Ct. 343 (1958) and *ibid.* 149 (1957), 355 U. S. 911, 881.

Habeas corpus—existence of "time of peace"—applicability of military law to offense by soldier dishonorably discharged while military prisoner

In *Lee v. Madigan*, noted in 52 A.J.I.L. 346 (1958), certiorari and leave to proceed *in forma pauperis* were granted. 356 U. S. 911 (1958).

¹ 49 Stat. 3000 *et seq.*

AMERICAN CASES ON ENEMY PROPERTY
AND TRADING WITH THE ENEMY

Brownell v. Kaufman, 251 F.2d 374 (D.C. Cir., Nov. 21, 1957), order enjoining Attorney General from voting stock or recapitalization of corporation vested under Act continued; *De Wagenknecht v. Stinnes*, 250 F.2d 414 (D.C. Cir., Nov. 27, 1957), alien not presently entitled to sue, granted petition authorizing taking of elderly witness' deposition; *Rogers v. LaSalle Steel Co.*, 250 F.2d 607 (7th Cir., Dec. 9, 1957), 1951 Joint Resolution authorized seizure of fund of royalties which, although accumulating after vesting, stemmed from contract rights held at vesting; *Von Der Heydt v. Rogers*, 251 F.2d 17 (D.C. Cir., Jan. 2, 1958), complaint dismissed by District Court because of failure to comply with order to produce documents and record, remanded for District Court to make findings; *Farbenfabriken Bayer, A. G. v. Sterling Drug*, 251 F.2d 300 (digested above, p. 526), German corporation's right to sue American corporation merely suspended by declaration of war; *Kammholz v. Allen*, 155 F.Supp. 511 (S.D.N.Y., Sept. 23, 1957), alien beneficiaries' present interest in stock, which was to commence in enjoyment in the future, is subject to seizure; *Jacobs v. Brownell*, 156 F.Supp. 401 (D.C., Oct. 10, 1957), action to enjoin sale of stock at public sale, or to give minority holders first purchase opportunity, failure to state cause of action; *Dresler v. Greeff*, 168 N.Y.S. 2d 409 (Sup. Ct., Spec. Term, N.Y. County, Oct. 11, 1957), 1956 treaty with Germany removing from German nationals personal disability to sue does not allow accounting action on claim subject to vesting; *City Bank Farmers Trust Co. v. Brownell*, 168 N.Y.S. 2d 519 (Sup. Ct. Appellate Div., First Dept., Dec. 10, 1957), question whether effective vesting depended on presence in U. S. rendered moot, since it appeared trust corpus was in U. S.

AMERICAN CASES ON NATIONALITY

Citizenship.—*Conrad v. Dulles*, 155 F.Supp. 542 (D. Puerto Rico, April 1, 1957), national who took oath of allegiance under 1938 statute did not lose nationality or citizenship by 5 years' residence in Dominican Republic; *Chin Kai Su v. Dulles*, 157 F.Supp. 190 (E.D.N.Y., Dec. 23, 1957), passport applicant failed to show by preponderance of credible evidence that he was citizen's grandson; *U. S. v. Meli*, 158 F.Supp. 217 (E.D. Mich., S. Div., Dec. 24, 1957), evidence failed to show fraudulent concealment of criminal record or filing of two prior naturalization petitions; *Harake v. Dulles*, 158 F.Supp. 413 (E.D. Mich., S.Div., Jan. 29, 1958), alien entering on temporary visitor's visa was not "person within United States," and could not sue for declaratory judgment.

Deportation. *Heikkinen v. U. S.*, 78 S.Ct. 299, 355 U.S. 273 (Jan. 6, 1958), evidence insufficient to support conviction for willful failure to depart from U. S. and evidence insufficient to support conviction for willful failure to make timely application in good faith for necessary travel documents; *Paris v. Murff*, 78 S.Ct. 384, 355 U. S. 926 (Jan. 20, 1958), certiorari

Colind Cruz-Sanchez v. Robinson, 249 F.2d 771 (9th Cir., June 15, 1957), order, after review in habeas corpus proceeding, not entitled to review by declaratory judgment; *Williams v. Mulcahey*, 250 F.2d 127 (6th Cir., Nov. 7, 1957), administrative finding of alienage supported by substantial and probative evidence; *Alarcon-Baylon v. Brownell*, 250 F.2d 424 (9th Cir., Dec. 11, 1957), since alien remained outside U. S. to avoid war service order supported despite subsequent 4-A classification and 1957 vs. *U. S. v. Murff*, 250 F.2d 436 (2nd Cir., Dec. 18, 1957), substantial evidence supported finding alien to be a person of constitutional psychiatric inferiority at last arrival; *Brownell v. Cohen*, 250 F.2d 770 (9th Cir., Dec. 19, 1957), finding of failure to prove good moral character not so unreasonable as to justify setting it aside; *Alesi v. Cornell*, 250 F.2d 877 (9th Cir., Dec. 28, 1957), alien charged with conviction of two crimes involving moral turpitude, order not invalid for lack of procedural due process; *Chao Li Chi v. Murff*, 250 F.2d 854 (2d Cir., Dec. 31, 1957), government could resort to confidential information outside of record in determining alien's inability to return to country because persecution feared; *Gallegos-Covarrubias v. Del Guercio*, 251 F.2d 519 (9th Cir., Jan. 6, 1958), order supported, since alien did not have immigration visa on entry, entered without inspection and failed to register or furnish notice of address change; *U. S. v. Garfinkle*, 158 F. Supp. 524 (W.D. Pa., July 1, 1957), alien given one-year suspended sentence for issuing fraudulent checks is subject to deportation, affirmed 251 F.2d 846 (3rd Cir., Jan. 14, 1958); *U. S. v. Valente*, 155 F.Supp. 577 (D. Mass., Oct. 16, 1957; rehearing Nov. 5, 1957), admission to immigration officer after arrest inadmissible, unreasonable delay in bringing before magistrate; *Aradanas v. Hoggan*, 155 F.Supp. 546 (D. Hawaii, Oct. 29, 1957), alien's return from Kwajalein in 1954 was a "re-entry," alien deportable because of 1934 counterfeiting conviction; *Holzappel v. Wyrsh*, 157 F.Supp. 43 (D. N. J., Dec. 11, 1957), sex offender's suspended sentence to reformatory, in probation officer's custody for 3 years, deportation not justified; *Jerônimo v. Murff*, 157 F. Supp. 808 (S.D.N.Y., Dec. 6, 1957), despite alien's convictions for 1934 larcenies, since the court considered them part of a single plan, alien not deportable under "two crimes involving moral turpitude" statute; *Borventte v. Barber*, 157 F.Supp. 575 (N.D. Calif., S.Div., Dec. 20, 1957), negative answer respecting Communist membership in visa application does not justify order on fraudulent concealment grounds; *Ferraiola v. Murff*, 157 F.Supp. 611 (S.D.N.Y., Jan. 15, 1958), pre-examination denied sustained on marriage disruption since pre-examination granted to alien and citizen wife and alien to maintain domestic relations here.

Denaturalization. *U. S. v. Minerich*, 250 F.2d 721 (7th Cir., Dec. 5, 1957), failure to disclose arrest and conviction 17 days before naturalization did not justify revocation of citizenship; government affidavit showed "good cause" notwithstanding failure to set forth all ultimate facts.

Naturalization. *U. S. v. Rosner*, 249 F.2d 49 (1st Cir., Oct. 28, 1957), statute did not require that petitioner's service in the armed forces be active; *Dela Cerna v. U. S.*, 249 F.2d 341 (9th Cir., Nov. 8, 1957), no "right

in the process of acquisition'' under 1952 savings clause, military service; *In Re Vacontios' Petition*, 155 F.Supp. 427 (S.D.N.Y., Sept. 30, 1957), confusion connected with cable reply concerning denial of alien seaman's waiver request, alien still eligible; *Petition of Munoz*, 156 F.Supp. 184 (N.D. Calif., S.Div., Oct. 22, 1957), Act authorizing summary naturalization of persons who served honorably in U. S. armed forces covered Philippine Army member; *Petition for Naturalization of B*, 156 F.Supp. 761 (D. Md., Dec. 9, 1957), "B" married armed forces member since last petition denied, evidence of moral reformation now convincing, petition granted.

Miscellaneous. *Gant v. U. S.*, 250 F.2d 40 (9th Cir., June 21, 1957), conviction for inducing alien to unlawfully enter U. S. for immoral purposes and concealing her from authorities sustained; *Mellos v. Brownell*, 250 F.2d 35 (D.C. Cir., Nov. 21, 1957), alien's action to obtain judgment declaring departure bonds not breached dismissed, U. S. had not consented to suit; *U. S. v. Sing Kee*, 250 F.2d 237 (2d Cir., Dec. 6, 1957), conviction for conspiracy to violate immigration laws and for willfully making false statements in passport applications sustained; government could cross-examine defendant's witness to disclose pleading of Fifth Amendment at grand jury; *U. S. v. Powell*, 156 F.Supp. 526 (N.D. Calif., S.Div., Nov. 1, 1957), noted above, p. 535, Government refused defense attorneys passports to Red China or North Korea so they could secure evidence, indictment dismissed; *Application of Paktorovics*, 156 F.Supp. 813 (S.D.N.Y., Nov. 26, 1957), revocation of Hungarian refugee's temporary parole sustained because of withholding of information and inconsistent statements; revoking of Hungarian husband's temporary parole for certain of his acts not warrant for revoking parole of his wife and children; *U. S. v. Manufacturers Casualty Ins. Co.*, 158 F.Supp. 319 (S.D.N.Y., Dec. 11, 1957), motions for summary judgment denied in actions against insurer on bonds conditioned to insure aliens' departure; *Montalban v. Brownell*, 157 F.Supp. 391 (D.C., Dec. 24, 1957), alien sailor on U. S. ships last entered U. S. from foreign port in 1953 and not entitled to status adjustment; *Department of Mental Hygiene v. Renel*, 167 N.Y.S. 2d 22 (City Ct. of New York, Spec. Term, Oct. 1, 1957), defendants undertook only a moral obligation in executing an "affidavit of support"; hence, were not liable for support furnished alien in California hospital; *Scimone v. Weaver*, 169 N.Y.S. 2d 470 (Sup. Ct., Spec. Term, Kings County, Part I, Nov. 26, 1957), alien's petition for certificate of eviction denied, Refugee Relief Act construed.

RECENT SIGNIFICANT GERMAN DECISIONS *

Insurance—claim of a Sudeten German—effect of Czech confiscation—Allied High Commission Law No. 63

Defendant, an Italian insurance company, had had branch offices with general agents in Hamburg, Vienna and Prague. After the annexation of Austria and the Sudetenland it gave up the Hamburg and Prague branches

* Prepared by M. Magdalena Schoch, U. S. Department of Justice.

and operated its entire "Greater German" business from Vienna. After the war it reopened the branch in Hamburg, and the Vienna branch was restricted to the Austrian business. The company had ceased doing business in Czechoslovakia. The Czech Government unsuccessfully attempted to obtain from it payment of the insurance claims of Sudeten Germans which the government had confiscated. The company refused to turn over any premium reserves. Plaintiff was a Sudeten German and the beneficiary of group insurance provided by his employer through a contract made with the defendant's general agent in Vienna. He became entitled to annuity payments beginning January 1, 1944. When he moved into Western Germany in 1946 he demanded payment. The insurance company refused to pay the annuity beyond May 1, 1945, on the grounds, *inter alia*, that the Czechoslovak Government might assert its claims under the confiscation decree, so that the company might have to pay twice; and that the claim was a German foreign asset in the meaning of Allied High Commission Law No. 63; consequently the rights of the beneficiary had been extinguished under Article 2 of that Law and German courts had no jurisdiction in this matter under Article 3.

The Supreme Court held for plaintiff on these grounds: (1) Law No. 63 applies to assets situated in a "foreign country," which means any country except Germany with the 1937 borders and the countries listed in the Schedule, which includes Austria (Art. 4 (a)). The situs of an asset must be determined by German law, including German private international law. Under German conflicts rules this insurance claim is not located in a foreign country. The insurance contract was made in Vienna, which at the time (1942) formed part of Germany, with the general agent for Germany; the insurance was governed by German law, which would have been applicable even if the Sudetenland (where the insurer and the beneficiary then lived) had been a foreign country at the time; the premium was paid in Vienna, and the premium reserve fund for this group insurance was established in Germany in accordance with German law and administered by the general agent for Germany. Hence the insurance contract must be deemed to be located in Germany. The contract remained under German law after the collapse in 1945. The fact that the beneficiary became personally subject to Czechoslovak law because of his residence, is immaterial. (2) Since the claim was never situated in Czechoslovakia, it could not be reached by confiscatory measures of Czechoslovakia, regardless of whether or not such was the intention of the Czechoslovakian legislation. Federal Supreme Court, 2nd Civ. Div., March 24, 1955 (II ZR 93/53). 17 *Entscheidungen des Bundesgerichtshofes in Zivilsachen* 74.

Division of Germany—inter-zonal agreement on railroad tariff rate—no liability of Federal Railroad for refund of additional fees collected by Soviet Zone railroad—analogue application of international convention

The railroad administrations of the Federal Republic and of the Soviet Zone agreed as of March, 1950, on a tariff of rates for inter-zonal trans-

portation of goods. This agreement provided that the German Railroad Freight Tariff and the Railroad Transportation Act should govern. Freight rates were fixed from the station of origin to the station of destination. Any additional zonal fees were to be calculated for the respective distances within the zones. The rates and any changes therein were to be published in specified official publications on either side. The additional fees imposed in the Western Zones were listed in the tariff. The Soviet Zone announced its additional fees on May 17, 1952, to be effective as of May 20, 1952; the corresponding announcement appeared in the official publication of Western Germany on June 20, 1952. Plaintiff shipped freight from Berlin via the Federal Railroad and was charged additional fees by the railroad administration in the Soviet Zone. The consignee held these additional fees unjustified; he assigned his claim for refund to the consignor, who sued the German Federal Railroad for a refund. He argued that no additional fee could be imposed prior to June 20, 1952, since under the agreement an increase in rates required publication in both zones. The lower courts held for the plaintiff.

The Federal Supreme Court reversed on these grounds: Section 96, par. 3, of the Railroad Transportation Act, which gives a claimant under a contract of carriage an option to enforce his claim either against the railway of origin or the railway of destination, does not apply to inter-zonal transportation. Germany is no longer a unified state but is *de facto* divided into two parts, each of which has *de facto* its own sovereignty. The Railroad Transportation Acts in effect in each part stem from one and the same source and thus there exists at present substantial uniformity of legislation, but formally each part can unilaterally change the Act. Hence Section 96, par. 3, of the Act cannot form the immediate basis for a claim against the Federal Railroad. The West German Railroad Transportation Act is territorially limited to the Federal territory. The Court of Appeals erred in reasoning that the applicability of Section 96, par. 3, had been agreed between the railroad administrations of the two zones and hence was applicable to the claim here. Inter-zonal agreements, similar to international treaties, can create obligations only between the governments concerned but do not create immediate rights of individuals.

It is true that an inter-zonal agreement is not an international treaty. The limited sovereignty of the two parts of Germany and their mutual non-recognition as sovereign states, on the one hand, and the determination of the German people to achieve a reunification—even though not realizable at the moment—as well as the continued existence of Germany as one state in the legal sense, on the other hand, forbid us to apply rules of international law directly to the relationship between the two parts of Germany. Yet the fact of the divided sovereignty compels us to examine the question to what extent an analogous application of international law is called for by this factual situation. (Page 314).

An agreement like the one here undoubtedly cannot change the Railroad Transportation Act as it is in effect in the Federal Republic nor can it form a basis for applying the Railroad Transportation Act to inter-

zonal transportation. Such an agreement likewise cannot create rights of individuals. The legal significance of the agreement, as far as the rights of third parties are concerned, is merely that the defendant, by announcing the inter-zone tariff, notified the public of the terms on which it would carry goods to and from the Soviet Zone and Berlin.

The provision of the joint tariff that the Railroad Transportation Act should govern does not preclude the non-applicability of certain provisions of that Act in the given situation. The Railroad Transportation Act was predicated on the existence of one Germany and one jurisdiction. While defendant has a duty to carry goods within the Federal territory, it has no such duty on the lines in the Soviet Zone, as appears from a special provision of the joint tariff. Consequently the rule of Section 96, par. 1, which provides that the railroad of origin is liable for the performance of the freight contract up to the time when the goods are delivered to the consignee, regardless of whether the railroad of origin uses its own lines or the lines of other railroads, cannot be applied without reservations. In applying paragraph 3, which is closely connected with paragraph 1, we must examine whether the nature of the claim asserted justifies the option which that provision gives to a plaintiff. Interpretation with the aid of international rules is indicated here. According to Article 42, § 1 of the International Convention concerning the Carriage of Goods by Rail,¹ claims for the refund of excess freight fees can be prosecuted only against the railroad which has collected the additional fee or for whose benefit it has been collected. This provision is designed to remove the difficulties which arise from refund claims among the railroads participating in international transportation. These difficulties exist to a much higher degree in inter-zonal transportation. In order to establish the liability alleged here, the Federal Railroad would have had to make an unequivocal statement that it was assuming an obligation, contrary to the practice in international transportation which involves less risk than inter-zonal transportation, to refund payments which it has not imposed and collected and from which it has not benefited. The general statement that the Railroad Transportation Act was to govern inter-zonal relations cannot be regarded as such a declaration. Since the action against the Federal Railroad is inadmissible, the question whether the additional fees were validly imposed despite publication by one party only need not be examined. Federal Supreme Court, 1st Civ. Div., May 24, 1955 (I ZR 164/53). 17 *Entscheidungen des Bundesgerichtshofes in Zivilsachen* 309.

Military occupation—commercial activities of the Joint Export-Import Agency—jurisdiction over disputes arising from such activities

At the time when the occupying Powers did not as a rule permit direct importation and exportation to and from Germany, the Joint Export-Import Agency handled foreign trade in the following manner: A pro-

¹ See Pollaczek, "International Legislation in the Field of Transportation," 38 A.J.I.L. 577 (1944).

spective importer filed a binding application with the Joint Export-Import Agency, specifying the terms of the contract; the Agency entered into a contract with the foreign exporter, guaranteed payment of the purchase price, and transferred the merchandise to the German importer upon its arrival in Germany. The purchaser was obligated to accept the goods and to pay the price fixed in the import application. A German importer, who had applied to the Agency for the purchase of prints from a French publisher, had attempted to rescind the contract by direct communication with the other party, but the exporter had made delivery and obtained the payment from the Agency through a bank credit. The German purchaser had returned the merchandise but the French publisher had refused to accept it. The German purchaser refused to pay, and an action was brought against him by a German company to whom the Agency had assigned its claim. The defendant argued that the claim did not come under the jurisdiction of the courts since the Joint Export-Import Agency was a public authority exercising governmental functions. The Court held that the agencies of an occupying Power which issued general regulations on foreign trade and granted import and export licenses undoubtedly exercised governmental functions. At the same time, however, they moved in the realm of private law when they engaged in buying and selling activities, which were not typical governmental functions. In these activities they utilized the forms of private law and never claimed that they were acting in a governmental capacity. Therefore claims arising from the contracts made by the Joint Export-Import Agency as the agent of the German party are governed by private law and can be enforced in the ordinary courts. Federal Supreme Court, 2nd Civ. Div., May 26, 1955 (II ZR 256/54). 17 *Entscheidungen des Bundesgerichtshofes in Zivilsachen* 317.

London Agreement on German External Debts—claim of Swedish firm against German Reich which arose during second World War—interpretation of Article 5, par. 3—declaratory judgment held permissible

In a case pending since 1942, a Swedish shipping firm sued the German Reich for damages arising out of a ship collision during the second World War. When, after protracted litigation, the case reached the Federal Supreme Court on final appeal, the question to be decided was what effect Article 5 of the London Agreement on German External Debts had on the cause of action, and in particular whether the German courts had jurisdiction. The Federal Supreme Court held that under the London Agreement no judgment ordering payment and, as a rule, not even a declaratory judgment, could be rendered on a claim of this kind; but in view of the fact that the case was ripe for decision at the time when the London Agreement became effective, a declaratory judgment fixing the amount of damage suffered was permissible.

The Federal Supreme Court reasoned as follows: The London Debt

Agreement¹ became German municipal law by the German law of August 24, 1953 (BGBI. II, 331), and by the implementing law of the same date (BGBI. II, 1003). It became effective for Sweden on September 16, 1953 (BGBI. II, 556); hence it is municipal law with regard to claims of Swedish creditors. Article 5, paragraph 1, provides that "consideration of governmental claims against Germany arising out of the first World War shall be deferred until a final general settlement of this matter." Paragraph 2 defers consideration of claims of governments at war with Germany or occupied by Germany in the second World War, or their nationals, until final settlement of the problem of reparation. Paragraph 3 deals with claims of neutral governments or their nationals "arising during the second World War," and provides that their consideration shall be deferred until the final settlement of the reparation problem (except insofar as they may be settled by agreement between the Three Powers and the neutral country). Thus neutral claims that arose during the war are placed on a par with reparation claims as contrasted with neutral and Allied prewar debts, which are to be "settled" by the Agreement.

"Deferment" means not only temporary exclusion from settlement by the Agreement but also postponement of any prosecution and satisfaction of such claims outside the Agreement. The purpose of the deferment was to prevent impediments to the execution of the Agreement in view of Germany's limited capacity to pay, the same motivation which underlies the promise of the Three Powers in the Paris Convention not to assert reparation claims against the current production of the Federal Republic. The German Delegation in London made efforts to achieve a waiver of reparation claims, but all it could achieve was the "deferment" in Article 5. The history, intent and purpose of this article show that the Three Powers, being the principal creditor countries, had an interest in giving prewar and postwar debts priority over war debts, mainly because of considerations of the foreign exchange situation and the limited capacity of the Federal Republic. Hence any *satisfaction* of neutral claims falling under paragraph 3 was to be excluded for the time being. That means that clearly a German court cannot order payment of such a claim. The question then is, whether it can render a declaratory judgment fixing the claim. The Agreement does not yield a ready answer. It provides for the jurisdiction of German courts in cases falling under the Agreement, where the creditor and debtor do not agree on the terms of settlement (Article 17); and the German implementing law provides that a creditor who refuses to assent to a settlement may prevent the running of the statute of limitation by obtaining a declaratory judgment (section 12, par. 1). As long as the neutral claims are not entirely canceled and there is a chance for a future settlement, it could be argued that there exists an interest of the owner in having his claim ascertained.

German law requires that the party asking for a declaratory judgment must have a "lawful interest" in an "early" declaration of its right

¹ German External Debts, T.I.A.S., No. 2792 (Dept. of State Pub. No. 5230).

(Section 256, Code of Civil Procedure). While it is true that a declaratory judgment would not place an immediate burden on the Federal Republic, yet the necessity of defending numerous actions for declaratory judgments prior to the indefinitely deferred "consideration" of neutral wartime claims might amount to an undesirable burden on German finances. Moreover, the general admissibility of such suits is hardly in keeping with the tendency of the London Agreement to defer decision on the entire complex of problems involved. When and in what manner the final settlement will occur is completely uncertain. It is certain, however, that a satisfaction of these claims will not be considered in the foreseeable future. Consequently the requirements for a declaratory judgment are generally non-existent.

Plaintiff has argued that it has an immediate interest in a declaratory judgment, inasmuch as it may be enabled by such a judgment to satisfy its claim at least partially out of the seized German property in Sweden.

The question whether the Swedish enactments on compulsory clearing with the German Reich . . . must be recognized by Germany under rules of international law need not be decided; for in any event these enactments were superseded by Sweden's adherence to the London Debt Agreement. Sweden as a party to the Agreement has consented to "stand still" with regard to claims of the kind involved here. This consent, however, would be contradicted if these claims could now be partially satisfied out of the seized German assets in Sweden. The Federal Republic of Germany, it must be kept in mind, would be obligated under Article 5 of Chapter 6 of the Agreement for the Settlement of Matters Arising out of the War and the Occupation . . . to indemnify the former owners of the seized assets who would be indirectly affected by such payments. In this manner the Federal Republic would be indirectly burdened financially with the claims not yet considered in and not falling under the London Debt Agreement. Such method of satisfaction would therefore be in contradiction with the intent and purpose of the Agreement and the agreed moratorium, which was also approved by Sweden. (Page 39.)

In the absence of an international agreement a German court has clearly neither a duty nor a right to render "judicial assistance" in the preparation of a foreign administrative proceeding directed to the satisfaction of such claims—in this case possibly in a proceeding before the Swedish Clearing Office—by pronouncing a declaratory judgment on disputed legal relationships. (Page 40.)

However, where there was a legitimate interest in a declaratory judgment at the beginning of the lawsuit, as is the case here, a continued interest in an early declaration may be found if the litigation had reached an advanced stage at the time when the actual situation changed. This is true here. Action was brought in 1942. Prolonged litigation followed.

In any event the dispute, in so far as it concerned the cause of action, was ripe for decision long before the London Debt Agreement became effective. Plaintiff expended the money and the effort necessary to procure the evidence for its claims in essential part at a time when it could not foresee that the *satisfaction* of its claim might depend on an as yet uncertain international settlement. In this unusual situa-

tion plaintiff's interest in an *early* declaration of its claims for payment must be deemed to continue in existence at least so far as the *cause* of these claims is concerned. It would be a gross violation of reasonable procedural economy if plaintiff were compelled to institute a new suit for a declaratory judgment in the courts of the Federal Republic in the case—not entirely impossible—that the Federal Republic of Germany would some time in the future promise payment in some manner. . . . This would amount to an intolerable impairment of the legal position which plaintiff had already attained. (Page 43.)

Federal Supreme Court, 1st Civ. Div., June 21, 1955 (I ZR 74/54).
10 *Entscheidungen des Bundesgerichtshofes in Zivilsachen* 22.

Claims of Italian nationals against German Reich—London Agreement on German External Debts—Peace Treaty with Italy

An Italian national sued the German Reich under a contract, made by him in Paris in 1944 with the German *Luftwaffe*, for the lease of a motor car, which had never been returned to him. The Federal Supreme Court dismissed the suit. It held that individual claims against the defunct German Reich can be asserted against the Federal Republic represented by the Federal Minister of Finance unless Federal legislation should designate some other agency. But the claim here is not enforceable by reason of Article 5, paragraph 4, of the London Agreement on German External Debts of February 27, 1953.¹ It is there provided that claims against Germany by countries which were allied to the Reich, and by nationals of such countries, arising out of obligations undertaken or rights acquired between September 1, 1939, and May 8, 1945, "shall be dealt with in accordance with the provisions made or to be made in the relevant treaties." In Article 77, paragraph 4, of the Peace Treaty with Italy, which Italy signed on February 10, 1947, in Paris,² Italy waived in its own behalf and in behalf of her nationals all claims against Germany and German nationals existing on May 8, 1945, except claims arising from contracts and other obligations entered into prior to September 1, 1939, or from rights acquired prior to that date. This treaty became binding on Italian nationals by Decree-Law No. 1430 of November 28, 1947; it was so held by decision No. 285 of the Combined Civil Divisions of the Court of Cassation on February 2, 1953. Thus the plaintiff could not prosecute his claim in an Italian court. Nor can he do so in a German court. While Germany was not a party to the Italian Peace Treaty, the waiver in Article 77, paragraph 4, is applicable in German courts by virtue of the London Debt Agreement, which has become German municipal law (Law of August 24, 1953, BGBI. II, p. 331).

The question as to the precise legal effect of Article 77, paragraph 4, of the Peace Treaty with Italy is controversial. The Second Civil Division of this Court, in a decision rendered prior to the State Treaty with Austria, held that under Article 5, paragraph 4, of the London Debt Agreement,

¹ Department of State, Treaties and Other International Acts Series, No. 2792.

² 42 A. J. I. L. Supp. 47 at 76 (1948).

such a waiver in a peace treaty extinguished the claim upon conclusion of the treaty (16 *Entscheidungen des Bundesgerichtshofes in Zivilsachen* 207). The First Division, in a case involving a Swedish claim, which was governed by Article 5, paragraph 3, of the London Debt Agreement, held that with regard to "claims not falling under the Agreement," Article 5 amounted to a standstill agreement for an indefinite period, *i.e.*, they were not enforceable for the time being (18 *ibid.* 22, above).

The Allies demanded the waiver from Italy in their own exclusive interest. They wished to prevent Germany's economic capacity from being weakened by claims of Germany's former allies and of their nationals, in order to be better able to realize their own claims and the claims of their nationals. The waiver was not intended to result in enriching the debtor for his own benefit. Nor was the waiver meant to constitute a final settlement. For Article 77 para. 4 provides expressly that the waiver was made without prejudice to any other provisions in favor of Italy and Italian nationals made or to be made by the powers occupying Germany. This is a manifestation of the custom of the Anglo-American states to establish broad legal rules and to leave it to those administering the rules to delimit their sphere of application in accordance with the practical possibilities of execution. This fact must be considered in the interpretation of such rules.

The competent Ministries of the Federal Republic, the Bank of German States and some authors are of the opinion that the claims of Italian nationals are extinguished; others believe that the claims are merely not actionable for the time being. The Italian Court of Cassation, in the above-mentioned decision, likewise said only that such a claim is not subject to the "jurisdiction" of the courts. However, it need not be decided here what the precise effect of the waiver is in the meaning of civil law. In any event, the plaintiff is no longer entitled to it at present.

If it is not completely extinguished but continues as an obligation of the debtor, it behooves the Federal Republic . . . to determine who is the creditor after Italy has waived all creditor rights in her own behalf and in behalf of her nationals.

Federal Supreme Court, 4th Civ. Div., Dec. 14, 1955 (IV ZR 6/55).
19 *Entscheidungen des Bundesgerichtshofes in Zivilsachen* 258.

*Citizenship of married woman—not automatically lost by marriage
to foreigner—Basic Law, Article 16*

A German woman married a Greek national on a date in 1949 when the Basic Law (Federal Constitution) had gone into effect. The question of her nationality arose in her divorce suit. Under Section 17, subsection 6, of the Nationality Act of 1913, a woman loses her German citizenship upon marriage to a foreigner, regardless of whether she acquires her husband's nationality. Article 16 of the Basic Law provides that

loss of nationality may occur only by virtue of a statute, and may occur against the wishes of the party concerned only if he does not become stateless thereby.

The Court of Appeals held that the woman had lost her German nationality because she had not expressed an intention to retain it upon marriage to the foreigner. The Supreme Court reversed. It held that the legislative history of the Constitutional provision showed clearly the intent that a German woman was not to become stateless by marriage unless she so wished. The language of the provision does not require that the woman must express a desire to remain a German or even that she must have a conscious desire to that effect.

As long as special circumstances in a given case warrant a different conclusion, it must always be presumed that a person wishes to retain her present nationality, in particular that she does not wish to become stateless by marrying a foreigner. Therefore, marriage to a foreigner makes her stateless only if she does not acquire any other nationality by the marriage and if it is shown that she did not wish to retain German nationality when she entered into the marriage.

The findings of fact of the lower court do not show such an intention. Federal Supreme Court, 4th Civ. Div., Dec. 14, 1955 (IV ZR 215/55). 19 *Entscheidungen des Bundesgerichtshofes in Zivilsachen* 266.

BOOK REVIEWS AND NOTES

An Introduction to International Law. By Wesley L. Gould. New York: Harper & Brothers, 1957. pp. xx, 809. Index. \$7.50.

Professor Gould has produced a good introductory textbook on international law. The book is designed as a text for college students. The author has approached the subject from both the historical and jurisprudential point of view. The primary emphasis is on the context in which international law operates rather than on cases as such. Before taking up specific topics, there is a brief discussion of the nature of law and legal systems, a sketch of the history of the development of international law, and a description of the international community in which international law has to function.

In the remaining chapters, the author takes up the principal issues in each of the many areas of interest to international law and organization in both war and peace. Indicative of the broad coverage of the volume are the chapters on International Transport and Communications and Hostilities and War Crimes. In this latter chapter and throughout the book the many subsidiary war crimes trials are given appropriate emphasis. Noteworthy also is the extensive employment of international organization materials relevant to any particular topic. There is a comprehensive bibliography. The United Nations Charter, the Uniting for Peace Resolution, and the Statute and Rules of the International Court of Justice are reprinted as appendices.

The book should serve its intended purpose. To this reviewer, the major objective of undergraduate courses in international or any other branch of law is to study the function of law as one agency of social control. It would be desirable if all undergraduates in preparing themselves for their rôle as citizens had some understanding of the function of law. International law is an appropriate vehicle for this study both in relation to the domestic system and to the more complex problems of creating an effective legal order in the world community. This volume is especially welcome as an antidote to the recent emphasis in college teaching of international relations on the power aspects of international politics with a consequent decline in the study of the potential contribution of international law to a world order. The author does not engage in the "hard sell" for his subject. It is left to the reader to draw his own conclusions on the evidence presented.

While the volume would profit the practicing lawyer or the law student as a comprehensive survey of the field, it is not a lawyer's book. Most of the leading cases are discussed or referred to, but the case treatment is not such as to make it more than a guide to the decisions. The very breadth of the coverage results in insufficient development of narrower

points which might be the very issue in controversy. An example to illustrate the point is the treatment of the legal status of the executive agreement (page 301, note 33), where the effect of the Supreme Court decision in the *Capps* case is not considered. Another is the cursory and somewhat one-sided discussion of the problem of the extraterritorial application of the antitrust laws (pages 447-448). A similar use of non-essential material which would lessen its value for the lawyer is the discussion of the quadrilateral Agreement on Fur Seals of 1911 without indicating that the agreement was no longer in force. Reference to these minor defects from the lawyer's standpoint should not impair the usefulness of the book for the purpose for which it was written. On the contrary, the author is to be commended for his valuable contribution to this purpose.

BRUNSON MACGREGOR

Cases and Materials on International Law. By Lester B. Orfield and Edward D. Re. Indianapolis: Bobbs-Merrill Publishing Company, 1955. pp. xvi, 780. Index. \$12.00.

The widening incidence of college and university courses in international law since the end of the second World War has reflected an accelerated interest in the subject to a degree which could hardly have been anticipated in the prewar period. This interest has been more than matched by a bumper crop of casebooks of which one of the most recent is that compiled by Professors Orfield and Re.

Prior collections of cases had already provided the instructor with a plentiful selection of classroom aids varying in conception from Dickinson's challenging arrangement, along with new editions of a number of established volumes (Cobbett, Fenwick, Hudson, and Briggs' encyclopedia case treatise), to Bishop's masterful tool for teaching, research and practice, which appeared only three years before the present volume. Complementing these orthodox works is the specialized treatment given by Professor Sohn to the rapidly expanding law of international organizations in his *World Law* and *United Nations Law*. There would seem to be some question, therefore, as to the utility of yet another collection at this time, apart from the authors' individualistic preferences in classroom presentation. New members of the family are always welcome, however, and this one is a worthy shelf-companion to its antecedents. Considerable care is evident in the selection, annotating and organization of material, subject to some minor criticisms to be noted hereafter.

Customary divisions of the subject are followed in the present work. An introductory group of sections dealing with the nature and sources of international law is followed by brief chapters on "International Agreements" and "Members in the International Community" (including a rather weak section on human rights). Between the long chapter on "Recognition" (165 pages) and the chapter on "Territory" is sandwiched a short discussion of "State Continuity and Succession," which might well have been placed with the materials on territory. Standard chapters on

Nationality, Jurisdiction and Diplomatic Intercourse (7, 8 and 9) are followed by a number of sections on international crimes (other than war crimes), extradition, judicial assistance and the enforcement of foreign judgments, all lumped together under the somewhat ambiguous rubric of "International Administration of Justice." Chapter 11, on the law of State Responsibility and International Claims is usefully divided into its substantive and procedural aspects, which facilitates understanding of the practical problems presented. Chapter 12 contains excerpts from pertinent treaties on pacific settlement of international disputes, most of which would have been better relegated to an appendix. A final chapter (13) on "Force and War" treats very summarily the once imposing subject of the law of war. The appendices include the United Nations Charter, the Statute of the International Court of Justice, a short list of bibliographical material on the teaching of international law, and a selected general bibliography.

As is to be expected, the compilation, to a considerable extent, includes materials repeatedly encountered in other casebooks, differences in editing being motivated by considerations of emphasis. On the other hand, the editors have managed to compress the texts of 196 cases and accompanying note comments into some 720 pages, a formidable selection achievement, indeed.

One is puzzled by an occasional defect in organization which seems attributable to a failure to assess accurately the problem treated. For example, under the general heading "Duty owed to Resident Aliens," the editors have limited their illustrations of denial of justice to the *De Galván* and the *Janes* cases. Yet these two cases do not deal with denial of justice to an alien in the proper sense, but rather with the question of international responsibility for inadequate efforts to apprehend and prosecute the perpetrators of crimes against foreigners. Apart from the objection that this particular category has come under serious attack as a legitimate ground of responsibility (the current Harvard Draft Convention on Responsibility would eliminate the *Janes* case principle), it is somewhat curious that the book should have failed to include any of the representative cases in which responsibility was held to arise for misconduct in the course of civil or criminal proceedings in which an alien was a party. The excellent note on denial of justice which appears under the general heading "Legal Basis of Claims" would be more appropriate under the section on Denial of Justice.

We find no reference to the claims provisions of Section VIII of the NATO Status of Forces Agreement, although these procedures represent a highly significant development in the law of international claims (paralleled in some respects by the agreements which the Soviet Union concluded in 1956-57 with the East German, Hungarian and Polish governments).

The editors assert that their objective has been to adopt an "enlightened liberal approach" in their volume; but their casebook, for the most part, conforms to the traditional pattern. It would be extravagant, perhaps, to hope that some attention might have been given to legal problems in-

volved in international commercial transactions, which confront the practitioner with increasing frequency. Nowhere in the volume is there a discussion of such elementary but essential questions as how to authenticate a document for use in a foreign country, the formalities required for executing a valid power of attorney in the United States for foreign purposes (or, at least, how to find out about such things), or the enforcement of commercial arbitration awards abroad—a subject which has assumed growing importance. In all fairness to the editors, however, their casebook is no more vulnerable on this count than its predecessors.

Professors Orfield and Re can take considerable satisfaction in the high quality of their product, which easily meets the exacting specifications for effective law school instruction.

ALWYN V. FREEMAN

Situation, Documents and Commentary on Recent Developments in the International Law of the Sea. By Brunson MacChesney. (U. S. Naval War College, International Law Situation and Documents, 1956. Vol. LI.) Washington, D. C.: Government Printing Office, 1957. pp. xvii + 629. \$2.75.

The volume under review is the fifty-first in a series of well-known publications in international law undertaken annually by the U. S. Naval War College. Although intended primarily for use by the U. S. Navy, this excellent volume will no doubt be received with considerable interest by private scholars and by governments.

Part I of the book prepared by Professor Brunson MacChesney is devoted to an "International Law Situation" which deals with the nature and scope of a neutral's duty respecting the passage of belligerent warships through the neutral's territorial waters and the rights of belligerents to use force to remedy violations of neutrality. In his Foreword the author remarks that he has included this situation "in the hope that it would serve to encourage later writers in this Blue Book Series to revive the custom that was inaugurated so many years ago by the late Professor George Grafton Wilson." Professor Wilson developed the device of the "International Law Situation" with great skill and with highly successful results. Professor MacChesney is to be commended for reviving this custom. The hypothetical situation he has presented is very similar to the *Altmark* case which occurred in Norwegian territorial waters in 1919. Hence, in the notes to the situation, the *Altmark* case is carefully examined and the literature on it is reviewed. The notes quite properly raise the question of the present adequacy—or inadequacy—of Hague Convention XIII, and contain some perceptive observations on the dilemmas confronting the weak neutral in the contemporary period. Finally, the valuable correspondence between Great Britain and Norway provoked by the *Altmark* incident is given in full in an appendix.

Part II, which makes up the bulk of the book, is a collection of treaties, municipal laws and other materials relating to recent developments in the international law of the sea. This reviewer knows of no other single source

which contains as useful and as well-chosen a collection of materials on the subject as are contained in these pages. Although not exhaustive, Professor MacChesney's compilation is very extensive and covers all of the principal developments in this complex field. One lengthy section, of particular value to students, is devoted to a review of significant national legislation and unilateral claims concerning the high seas, the territorial sea, the continental shelf, and fisheries, along with representative protests some states have made to recent national claims. Throughout this section, as well as throughout the other sections making up this part of the volume, are found useful introductory notes providing the reader with additional background information, extensively citing documentary sources, and furnishing an occasional guide to recent literature on the various topics. Each section is also accompanied by a detailed table of contents.

In Part III of the volume Professor MacChesney has brought together recent national claims and agreements providing for defensive air and sea zones. In this barely emergent but vitally important area, the United States has been the principal innovator, and the materials presented reflect this fact. While defensive sea areas date back to the period of World War I, air defense identification zones and weapons-testing areas are post-World War II developments. The legal issues raised by these various national claims can no longer be disregarded by international jurists simply for the reason that they raise difficult and politically explosive questions. It is to be hoped that this review of recent claims made by states in order better to insure their security will serve to stimulate further inquiry in an area that demands the most careful attention by jurists.

ROBERT W. TUCKER

Status of Forces Agreement: Criminal Jurisdiction. Joseph M. Snee, S.J., and A. Kenneth Pye. New York: Oceana Publications, 1957. pp. 167. \$6.00.

This concise report on the criminal jurisdictional aspects of the NATO Status of Forces Agreement is based upon a field study financed jointly by the American Law Institute and the Georgetown Law Center. With the co-operation of the Department of Defense the study was made in France, Italy, Turkey and the United Kingdom. Using case material, these professors of the Georgetown University Law School reach the conclusion that the concept of such agreements as this, imposing two jurisdictions upon men of the armed forces abroad, is the "most radical and interesting innovation of our era." Throughout the text references are made to the views of the negotiating representatives of the various NATO countries as recorded in the Working Papers of the Status of Forces Agreement.

In general the text is keyed to the provisions of the Agreement and in particular to Article VII in which the criminal jurisdictional provisions are found. Reference is also made to the comparable agreement with Japan, which is substantially the same.

The subject of jurisdiction by courts-martial and foreign courts over

dependents of members of our armed forces or their civilian dependents is treated in some detail, despite proper recognition of the import of the *Reid v. Covert* and the *Kinsella v. Krueger* decisions of the Supreme Court.¹ The reviewer must agree with the apt conclusion of the authors that:

The Court, therefore, in the *Covert* and *Krueger* cases never faced the basic issue. The majority, as well as the concurring justices, failed to see that the fundamental choice was not between a federal civilian court and an American court-martial, but rather between an American court-martial and a foreign court.

The Constitutional and statutory questions arising out of the waiver of the primary right to exercise concurrent jurisdiction, which were argued in the *Girard* case,² are treated in a critique of the opinion of the District Court (152 F. Supp. 21). These opinions and important documents pertaining thereto will be found in the Appendix to this volume. The effect of such waiver by the French Government upon the right of a claimant to institute subsequent proceedings of a joint criminal and civil nature is treated in some detail.

The situation of the United States as a receiving state is usually brushed off rather lightly. Nevertheless, the authors envision the need for legislation implementing the treaty if our Government fulfills its obligations as a receiving state.

After thorough and detailed consideration of the variety of problems both procedural and substantive, arising out of the most unusual provisions of this convention, the authors conclude:

. . . that the trials of American military personnel in the countries visited are conducted fairly and impartially [and] in no case studied did we feel that the fundamental rights of any service man were violated. . . .

The analysis of the actual cases, together with the studious discussion of the legal principles involved, makes this volume a necessary tool in the hands of our foreign representatives, be they judge advocates or ambassadors. Moreover, those who loudly proclaim the supposed virtues of the existing NATO arrangements for criminal jurisdiction would be well advised to give heed to the text of this admirable study.

CLAUDE B. MICKELWAT
Major General, U. S. A., Ret.

Les Conditions du Procès en Droit International Public. By Maastricht. Bos. Leyden: E. J. Brill, 1957. pp. xvi, 344. Index. Fl. 34.

This work (Volume 19 in the well-known excellent *Bibliotheca Theodrica* series) is a translation by the author of a prior study with the same title published in Dutch in 1951 and reviewed in Volume 46 of this JOURNAL at page 757 (October, 1952). He has taken advantage of the

¹ 354 U.S. 1 (1957); digested in 51 A.J.I.L. 783 (1957).

² 354 U.S. 524 (1957); 51 A.J.I.L. 794 (1957).

re-publication to bring the work to date by inserting references to judicial decisions and treatises through the end of 1954. One new section is also added (page 163), taking issue with the separate opinion of Judge McNair in the *Albanian Gold* decision rendered by the International Court on June 15, 1954.

This translation has made available to a larger circle of readers a thorough and competent treatment of the pertinent jurisprudence of international tribunals in the light of principles of modern procedural science. Under this conception of litigation as a legal relationship (*Prozessverhältnis*) distinct from the legal relationships of substantive law, certain preliminary conditions (*Prozessvoraussetzungen, conditions du procès*) are prerequisite to the valid establishment of the relationship. This work analyzes those conditions precedent to adjudication as they are manifested in the functioning of international tribunals. The author holds an official position in the Legal Department of the United Nations.

EDWARD DUMBAULD

A Guide to Diplomatic Practice. By the late Sir Ernest Satow. (4th ed.) Edited by Sir Nevile Bland. London, New York, Toronto: Longmans, Green and Co., 1957. pp. xviii, 510. Index. 63 s.

Forty years after the first appearance of Sir Ernest Satow's *A Guide to Diplomatic Practice*, a fourth edition has been edited by Sir Nevile Bland. Sir Ernest had published in 1922 a second edition of what had quickly become a standard book of reference, and three years after his death in 1929 a third edition appeared under the editorship of H. Ritchie. The editor of this fourth edition admits in his preface that he faced difficult choices; he has sought to retain the flavor of "Satow" but to add five new chapters on current international organizations, as well as to bring up to date much of what appeared in earlier editions. This he has done without materially increasing the size of the volume, a wise limitation for a *vade mecum*. One gains the impression that the editor, with his background in the British Foreign Office and as ambassador to The Netherlands, has struggled to balance a certain nostalgia for the methods of the old diplomacy with the objective of supplying practical useful information to the young diplomatist who is beginning his career in what Sir Nevile describes as "one of the most interesting and rewarding professions in the world."

The editor traces to the advent of the Hitler regime modern practices of "non-diplomacy" with their pattern of abusive language in the press, over the air and in the United Nations. Such deplorable tactics are indeed commonly used by some governments and their representatives, but they are by no means universal. It would be a pity if the reader of this excellent book should get the impression that there is a sharp line between the old and the new. One could have wished that the editor might have noted the extent of the continuity, and might have examined the modern procedures of international conferences and organizations

from the point of view of comparing them with practices of earlier periods. For example, while one can still read here in detail about the "diplomatic body" with its *doyen*, one gets no picture of the actual functioning of the body of permanent representatives to the United Nations at its headquarters in New York. One finds good advice for a diplomat who is proceeding to his post as ambassador to another country, including matters of dress and entertainment and social amenities, but nothing comparable about the now customary dinners of the President of the Security Council or the nature and use of the cocktail parties, lunches and dinners at which much of the real diplomatic negotiation is conducted during meetings of the General Assembly. One notes that there is wise counsel for the ambassador or junior member of an embassy staff when he takes up his duties in a foreign capital, but nothing comparable to aid the Permanent Representative to the United Nations as to the presentation of his credentials, contacts with his fellow delegates, and arrangements to be made with the United States Mission for tax exemptions and the like. One can read about the conduct of diplomatic representatives of opposing belligerents who meet in a neutral capital during a war, but nothing of the conduct of those who perforce deal with representatives of unrecognized governments at the United Nations or at special conferences such as that at Geneva in 1954, to which some six pages are devoted. The Japanese Peace Conference of 1951 is described in terms of its unorthodox nature, but one is not given any entertaining glance behind the scenes such as is supplied for the European conferences of the nineteenth and earlier centuries. The matter of the languages used in diplomacy over the centuries is covered fully, but the reader is not told how the modern mechanics of simultaneous translations makes possible the multilingual proceeding at the United Nations. To be sure, the developing usages and formalities in the United Nations are not as colorful even as those still practiced at the courts of Europe, but they are not all drab and many of them are of practical interest.

All of which is not by way of criticism of Sir Nevile, since, after all, the United Nations customs are still new, but rather to suggest that perhaps some future edition of this admirable work may include a study of these modern practices which it is not unreasonable to call "diplomatic." There may then be need of a section also on the new European institutions which are now being built and for which, at this writing, a capital is now being sought. If this were undertaken, it might be suggested that some of the purely descriptive matter outlining the structure of the United Nations as contemplated in the Charter could be reduced and that for purposes of a book of this kind, less space could be devoted to the International Court of Justice (which is admirably summarized) on the ground that the average diplomatist would have but little contact with such a tribunal.

The chapters on the Commonwealth and the "Associations of Western States" from the Treaty of Dunkirk through the European Coal and Steel Community are very helpful. The rapid growth of organizations

as the editor notes in his preface, makes it almost impossible for any such book to be kept up to date unless there are frequent supplements. Nonetheless, this book brings home the fact that there is still much wise advice in the classic comments of de Callières on the conduct of diplomacy and that "the qualities of the good negotiator" are but little changed. Matters of form are still important and "Satow" is still the authority to which foreign offices and diplomatists will turn.

PHILIP C. JESSUP

The Relations of Nations. By Frederick H. Hartman. New York: Macmillan Company, 1957. pp. xxvii, 637. Index. \$6.25.

The plaintive observation that a student of international relations is a person who is always apologizing for not knowing more about everything else,¹ may well suggest itself to the casual reader who happens to examine the Index of Professor Hartman's well-written textbook. He will discover an apparently heterogeneous medley of personalities and events calculated to stimulate some curiosity as to how they are tied together. Thus, he will find the Battle of the Bulge sandwiched between Katharine Lee Bates and Charles A. Beard; Ralph Bunche next to the Burma Road; Edwin Borah rubbing elbows with Napoleon Bonaparte; Alistair Cooke nestling between Convertible Currencies and the *Corfu Channel* Case; Mahatma Gandhi in the uncomfortable company of de Gasperi and a Gatlin Gun; Harold Sprout close to the Spanish Armada; the wily Talleyrand cheek by jowl with both Tariffs and Tanks; and the turbulent Protestant Reformation, not to be outdone in such matters, linked with Propaganda, Protectionism and the Proximity Fuse.

Military engagements, diplomatic maneuvers, a touch of economics, a smattering of law, allusions to national cultures, a good deal about power politics, some references to the United Nations—all are present. What theories give them coherence and meaning? What criteria mark off the significant event, the important personality, the durable "relation" from the insignificant, the trivial and the transitory? Such questions are more easily asked than answered. Clearly some kind of theory is needed, else the work becomes, at best, a superficial descriptive survey and, at worst, a jumbled invitation to incoherence and confusion.

Professor Hartman wrestles manfully with the questions and comes up with an answer which seems to this reviewer (who disclaims any expertise in such large matters) to invite as many difficulties as it purports to solve.

Acutely aware of the risk of presenting a "shallow perspective of recent

¹ See Palmer and Perkins, *International Relations* at p. 5 (1953). Professor Manning is quoted as saying that the student of international relations regrets "he does not better understand psychology, economics, diplomatic history, law, jurisprudence, sociology, geography, perhaps languages, comparative constitutional organization and so on down a long list." Cf. Zimmern (ed.), *University Teaching of International Relations* (1939), from which the quotation is taken, and Wright, *The Study of International Relations*, esp. pp. 16-61 (1955).

events," he assures us that he seeks a "distinct theory" capable of relating a set of "basic principles" that will provide a framework for sorting and making meaningful future international events. At the same time he insists that no rigid framework is possible, nor one that imposes "a greater unity upon the subject matter than is implicit in it." This cautionary note is directed against those scholars who, he says, have tended to emphasize a "single cause for action on the part of nation-states, whether this be characterized as the desire for peace or the struggle for power" (One wonders what "scholars" are so foolish as to merit this description.) His own preference is for a "conceptual tool" of a more variable kind. "There is," he tells us, "a single theme common to the actions of nation-states in the sense that they follow out in their policies their particular concept of their national interests. . . ." Naturally, he warns, these concepts vary greatly depending on time, place and circumstances.²

This reviewer, in the absence of any alternative theory of his own, is not inclined to scoff at this familiar echo of a very familiar theme. Yet he confesses to large doubts. These doubts center on the possibility of applying such an approach to the turbulent, amorphous and frequently contradictory forces and influences which tend to shape and affect state "behavior."

The difficulty with the approach is not merely one of definition, though certainly greater precision in the use of terms is needed (*i.e.*, as between "interests," "objectives," "principles," "policies," "commitments," etc.);³ nor is it merely one of identification and enumeration (*i.e.*, whose interests and what kinds are the objects of discourse).⁴ It centers rather on the basic assumption that the significance of behavior can somehow be revealed by a process of analysis which avoids the tough job of probing beneath the surface manifestations of behavior to see what kinds of motives motivated it and why they did so.

² All quotations are from the Foreword at pp. vii and viii.

³ The effort by Quincy Wright, Harold Lasswell and others to bring greater precision to the concepts and rhetoric of international relations is, of course, well known. See Lasswell and Kaplan, *Power and Society* (1950), and Wright, *The Study of International Relations* (1955). See also *Major Problems of United States Foreign Policy 1952-1953* (Brookings Institution), at pp. 373-375. Of course, the need for greater precision in the use of prose does not mean that the social sciences should attempt to displace their normal mode of discourse by introducing the symbolic language of mathematics. This reviewer concurs in the judgment of Bernard Brodie that the few attempts of this kind which have appeared, seem "forced, perverse and usually ludicrous." *Bureau of Scientific Progress and Political Science* (Rand Corporation Paper P-968, 1956) at p. 5.

⁴ Readers familiar with the so-called "interest" approach in legal philosophy are aware of the elaborate enumeration of Roscoe Pound's, indicated in his *Outline of Jurisprudence* 96 *et seq.* (1943). For criticism of attempts to apply this approach to the analysis of interstate behavior in the absence of greater sociological knowledge and insights, see Stone, *The Province and Function of Law* 492 (1946). This reviewer has always considered "interests," defined as "demands or desires which individuals or in groups seek to satisfy," as merely a partial means of identifying the ingredients of actual or potential conflict. As such they are hardly an adequate "conceptual tool" by which to understand or evaluate individual or collective conduct.

This is no place to explore the issues raised by these doubts. Suffice it to suggest that Professor Hartman's analysis fails to dispel them.

Leaving abstract comments, inspired by the Foreword, and turning to the book's contents, it should be recalled that it is intended as a vehicle for undergraduate instruction at the college level. Viewed from this angle, this reviewer believes that both subject matter and organization are well suited to provide an over-all awareness of much that is relevant to an understanding of contemporary history. Whether this over-all awareness will be deepened and informed by the kinds of insights that might be engendered through a more thorough probing of fewer topics must, however, remain doubtful.

As previously indicated, the book covers a wide front embracing such topics as the "fundamentals" of the state system, national power and foreign policy, the relations of states, disputes settlement, the problem of power and power patterns and the foreign policies of all the major Powers and many of the minor ones. "Case studies" are frequently introduced to give concrete bite to the expository material.

Included in the part devoted to the "Relations of States" is a chapter on international law. It totals 19 pages or three percent of the total volume—an allotment which seems to be about par for writers in this area. While Professor Hartman's treatment of "law" is one of sympathetic indulgence, he yet slips into the familiar error of describing it as "the formalization of the *status quo*." The half-truth conveyed by this assertion is only partially atoned for by the author's later inconsistent concession that there are no gaps in law nor any issues which could not be settled on a legal basis if the parties so desired.

Despite its overly ambitious promise of a "distinct theory" capable of providing clues to the future, the book, as a whole, shows a good deal of imagination, a sophisticated awareness not only of the nature of contemporary problems but of their historic antecedents and a considerable skill in compressing a complex body of material. Furthermore, his occasional use of "case studies," especially in Part V, is calculated to make the work an interesting teaching tool. The reader may not agree with the author's judgment here and there; furthermore, he may feel that the author has knocked down quite a few straw men. At the same time he is likely to recognize that the work is characterized throughout by a sense of balanced realism which contributes to an understanding of a tough and elusive subject.

HARDY C. DILLARD

The United Nations: The First Ten Years. Edited by B. A. Wortley. New York: Oceana Publications; Manchester: University of Manchester Press, 1957. pp. viii, 206. Index. \$5.00.

This is a very stimulating book. A comparison with the volume on the first ten years of the League is inevitable. The present volume is superior to the League volume. For one thing it is written *ab exteriore* and is less pious than the latter. For another it contains more meat. Chapters

deal with United Nations organs, a few specialized agencies, plus GATT, and are very substantial and even technical (especially Chapters 9 and 10, on the International Bank and Fund), reflecting, perhaps, the Manchester approach.

There is no call to agree or disagree with the opinions expressed by the nine or ten authors of these chapters. Also there is no chapter of "conclusions" or "summary" to be found here. Perhaps the title would have been more accurate if it had begun "Some Aspects of." A very brilliant little book.

PITMAN B. POTTER

Canada and the United Nations. By F. H. Soward and Edgar McInnis. New York: Manhattan Publishing Co., 1956. pp. xi, 285. Index. \$3.00.

This volume is the fifth in a series of national studies of the rôle of states in international organization which has so far limited itself to such lesser Powers as Denmark, Israel, Switzerland, and Sweden, although the project has wide coverage. In presenting the story of Canada's contribution, the two authors have gone beyond its title and have included "a discussion of NATO as an alternative approach to security and of the Colombo plan as a significant feature of Canada's policy with respect to the under-developed countries."

Following a preliminary chapter that gives the historical background on the formation of the United Nations, there is an examination of the functioning of the organization, stressing the leadership Canada assumed both in matters of policy and personnel. Canada has long since grown out of the narrow concept so long held that her function was merely as an interpreter of the New World to the old, or vice versa, in Anglo-American relations. Today in international organization Canada has demonstrated that she will follow a distinctive course. As a Power of middle rank she has played a significant rôle based upon a certain degree of realism unhampered by traditional obsessions. Aware that the implementation of many major projects must eventually rest with the larger leading states, Canada has adopted the attitude of securing general commitment and then furnishing aid commensurate with her position, such as was done in Korea. That conflict also illustrated another aspect of Canada's rôle as mediator, particularly in reconciling such divergent Powers as America and India over the exchange of prisoners. In the words of the authors:

A country like Canada . . . may legitimately feel at times that there is a genuine disparity between its responsibilities and its influence and membership in the United Nations, insofar as it means an increase in responsibilities without an appreciable advance in influence exacts a price that is far from negligible in return for its contribution to the creation of the kind of world that Canada's national interest demand.

In assigning the task of preparation of this volume to Messrs. Soward and McInnis the Carnegie Endowment chose wisely. Both men, through

the combination of scholarship and practical experience, have a rich knowledge of Canadian international relations to share with their readers. The merit of this little volume under review, particularly the chapters authored by Professor Soward, is to be found in the easy weaving together of the diverse strands, the copious illustrations and quotations, and the compactness of the language which advances the narrative. Canadian readers will have added appreciation of the way domestic politics are related to policy determination on the international scene.

LIONEL H. LAING

La Grèce et les Nations Unies. By S. Calogéropoulos-Stratis in collaboration with P. A. Argyropoulo, S. Castanos and D. Sidjanski. New York: Manhattan Publishing Company, 1957. pp. v, 190. Index. \$3.00.

This volume is one of the country studies initiated in 1956 by the Carnegie Endowment for International Peace to determine the place which the United Nations occupies in national policies, and the attitudes of various Member and non-member nations. The study reflects the degree of comfort a small nation like Greece could derive from an international organization which aims at a more effective way to peace than the old spheres of influence in a balance-of-power system. In this context it explores the rôle of the United Nations in the defense of Greek independence and territorial integrity, which were threatened from 1946 to 1949 by the Soviet-satellite pressure in the form of a guerrilla war against Greece. In discussing Greek action in the United Nations on questions of security and self-determination, the authors stress the unresolved Cyprus question, which has been brought before the General Assembly each year from 1954 to 1957. As a background to these issues the authors analyze the foundations of Greek foreign policy with an insight which their experience affords.

While the book broadly explores the national experience of the Greeks with the United Nations, its authors might have usefully developed in more detail the Greek position on the major international issues. Be that as it may, their present study is unique and should be welcomed by students of international relations and Greek affairs. They have presented a constructive and useful analysis of the structure and function of the United Nations, stressing its value as a safety-valve in an international community which is overcharged with tensions and pressures of grave consequences.

CHARILAOS G. LAGOUDAKIS

The United Nations Trusteeship System. By James N. Murray, Jr. (Illinois Studies in the Social Sciences, Vol. 40.) Urbana: University of Illinois Press, 1957. pp. viii, 283. Index. \$3.50, paper; \$4.50, cloth.

This volume presents an excellent historical survey of the formation, functioning and growth of the international trusteeship system set up under the United Nations Charter of 1945. As the author points out, the Trusteeship system is the outgrowth of ideas and practices developed from

the previous Mandates system under the League of Nations; and Part One, dealing with the formation of the United Nations Trusteeship System, sets forth in careful detail a description of the League of Nations Mandates system, the San Francisco Conference of 1945, and the subsequent setting up of the Trusteeship system and the organization of the Trusteeship Council in 1947. Because of its unusual and distinctive features, a separate chapter at the end of Part One is devoted to the Trusteeship Agreement covering the former Italian colony of Somaliland.

The bulk of Part Two deals with the functioning of the Trusteeship Council. Separate chapters deal with the mechanics of the Council and with Annual Reports, Petitions and Visiting Missions, upon which its main functional activities are based. A following chapter deals with the relations of the Trusteeship Council with other organs of the United Nations.

Except for its last two chapters, the book consists of a detailed historical account of the development and growth of the international trusteeship system from its inception up to 1955. There is little critical comment or evaluating discussion of the steps taken or decisions made in the building of this outstanding international machinery for shaping the government of some 18,000,000 underdeveloped people in colonial areas. The author's central theme is, as he says, "the actual functioning of the international supervisory machinery involved," not "the effects on a territory resulting from a status of trusteeship." As an historical survey the book is painstakingly done. As such, however, it deserves a more detailed index.

To the casual reader perhaps the most interesting part of the book lies in the two concluding chapters, dealing with the diverse and difficult pathways which lead to self-government or independence and setting forth the author's own conclusions.

As the author points out, the colonial policies of France, Belgium and Great Britain rest upon quite different fundamental objectives; and due to these differences and to ethnic and geographical complications, the Charter goal of ultimate independence or self-government for all trust territories must be sought often along quite different pathways. Nor will the end results be always the same. For instance, British Togoland, now having graduated from the Trusteeship system, has been led into a course not of isolated independence but of union with an independent British Gold Coast within the British Commonwealth of Nations. Does this spell the practical success or failure of the international trusteeship system? In the General Assembly Fourth Committee some representatives of non-administering states expressed grave doubts. But in the words of the author,

if the people of a territory are assured adequate representation in the organs of an independent state or international union, and if, further, their choice is made freely under international supervision, who is to say that the requirements of trusteeship have not been met?

Certain unsolved problems still present themselves and threaten possible future disruption. Unhappily, the United Nations Charter, while setting up the Trusteeship Council as one of "the principal organs of the United Nations" (Article 7) and clothing it with responsibility for the interna-

tional supervision of the administration of Trust Territories, elsewhere speaks of the Trusteeship Council as "operating under the authority of the General Assembly" (Article 85). The framers of the Charter with great wisdom were meticulously careful to require that the Trusteeship Council be composed of an equal number of administering and non-administering states. In the Fourth Committee, determining trusteeship questions for the General Assembly, however, the non-administering states overwhelmingly outbalance the administering states. The viewpoint of the Fourth Committee, therefore, is bound to differ markedly from that of the Trusteeship Council. In case of conflict, which shall prevail?

After his painstaking and careful historical account of the building and development of the international trusteeship system, the author's final conclusion is most hopeful, and, I believe, true. As he says:

Perhaps the most encouraging result of this study is the realization that this organ of the United Nations is functioning successfully. . . . A survey of the formation and functioning of the trusteeship system leaves the over-all impression that the system is . . . functioning well.

FRANCIS B. SAYRE

The Refugee and the World Community. By John George Stoessinger. Minneapolis: University of Minnesota Press, 1956. pp. v, 239. Index. \$4.50.

This work, the author of which is himself an ex-refugee and a former officer of the International Refugee Organization in the Far East, is a general survey of the problem of refugees, displaced persons and stateless individuals in the 20th century. Concentrating primarily on the years following World War I, the author stresses what he considers to be a feature unique to this period, that is, "the immense difficulty, often impossibility, of finding a home" for the contemporary refugee. The purpose of the book under review is to describe and evaluate the successes and failures of the various methods resorted to by the world community since 1917 in order to find a home for the international exile.

The work is divided into three main parts. Following a brief introduction on the Refugee and the Rights of Man, appear sections on the League of Nations Era and World War II, the International Refugee Organization, After IRO. Within each section the author proceeds chronologically, describing the successive efforts of the world community to cope with each man-created Diaspora. The author concentrates on the history of the various international devices tried one after another in order to find a solution for the ever-recurring problem of exiles, beginning with Nansen's work and ending with the latest specialized agencies of the United Nations Organization. He also attempts an evaluation of the policies of these successive organizations, from the early emphasis on legal assistance to the present stress on rehabilitation and resettlement.

Since the work is a broad and comprehensive survey of approximately forty years of international activity in an often complex and difficult field,

it never really concentrates on any one aspect of it or analyzes exhaustively any one of the many problems inherent in it. Only a general picture of the many facets of the world's effort on behalf of the refugees is given, including brief analyses of the effectiveness of the various international agencies, of the various trends in international assistance and the different forms of the aid given to refugees, of the repatriation and resettlement schemes tried as a solution for the problem and of the present status of the remaining exiles.

On the whole the problem is treated sympathetically and ably. The book is well written, and as a general survey of international work in the field of "refugeedom" it is very good. Perhaps the author overstresses the international aspects of the solution to the problem and tends to minimize the effectiveness and feasibility of individual state action. The work was written prior to the Hungarian revolt, or the author might have modified his views on the effectiveness of state action, since the Hungarian refugee problem was disposed of rapidly and efficiently through the unilateral efforts of a half-dozen states. In spite of the author's obvious predilection for an institutionalized international agency maintained permanently for the solution of refugee problems as they arise, the death of the International Refugee Organization leaves the world with no such organ at present and the answer must be sought necessarily within the framework of individual state policy. Nor is this solution always inferior to that provided by an international agency, as the author generally seems to think.

GEORGE GINSBURGS

Das Vertragsrecht der Internationalen Organisationen. By Karl Zemanek. (Rechts- und Staatswissenschaften, Vol. 15.) Vienna: Springer-Verlag, 1957. pp. xii, 159. Index. \$6.45.

The word "*Vertrag*" in German means both treaty and contract. Hence, this is a monographic study of the treaties as well as contracts concluded by international organizations. The author, assistant professor of international law at the University of Vienna Law School, can be regarded as a young member of the "Vienna School": his basic approach is that of his teacher, Professor Alfred Verdross; his theoretical reasoning is based on Hans Kelsen; his foundation for the theory of international organizations is this reviewer's work of 1929 on the *Union of States*. The book is done with extreme care: a comparative study of universal and regional, general and specialized organizations, their constitutions and practice, taking into consideration all relevant national and international court decisions.

By way of introduction, the author deals with the concept of international organizations, their personality in international and municipal law, and their organizational structure. The second and principal part consists of three sections.

In the first section the author investigates the treaties. He distinguishes the constitutional (agreements between international organizations), the

institutional (*e.g.*, Conventions on Privileges and Immunities, Headquarters Agreements) and the functional (*e.g.*, under Article 43 of the U.N. Charter) agreements. They are no doubt international treaties, although of a novel type, and the law applicable to them is international law. He studies in a detailed and interesting way the problems of the organs competent to conclude these treaties, the procedures of conclusion, ratification, accession, "acceptance," registration, and the settlement of conflicts arising out of these treaties.

The second section deals with the contracts made under the internal law of international organizations; this is also international law, although of a hierarchically lower order. *Pro foro interno* international organizations have a capacity to legislate, creating general abstract norms; this capacity has its legal basis for validity in the corresponding norms of the constitution. Here belong the Staff Regulations (the Statutes, so to speak) and the Staff Rules (the executive ordinances, so to speak). These general norms are applied to a single concrete case in the contracts of appointment of international civil servants. The legal analysis of these contracts is very interesting. On the one hand, the international civil servant, by accepting the contract, submits not only to the internal law of the international organization concerning its functionaries, but also to its possible change in the future. On the other hand, the individual conditions of appointment can only be changed by common consent. These contracts, therefore, are not merely private law contracts; they have statutory as well as contractual elements. As they are contracts under the internal law of international organizations, *i.e.*, under international law, they are excluded from the jurisdiction of municipal courts, not by way of privileges and immunities, but *ratione materiae*. Conflicts arising out of these contracts today go before international courts, the Administrative Tribunals: international law, the internal law of the international organizations, Staff Regulations, Staff Rules, the individual contract—the lacunae filled out by the general principles of law—are the applicable law.

Particularly novel is the author's treatment of the contracts on "consultation" between governmental international organizations and private international organizations. Here we have a field of law which is newer and, hence, even more fragmentary than the law of international civil servants. The norms are, at this time, unilaterally posited by the international organizations.

Finally, there are the private law contracts. The author correctly starts from the thesis that the capacity of international organizations also to conclude private law contracts, a capacity which is one and the same in all member states, has its legal origin, in the last analysis, in international law, namely, the basic treaty. But, since international organizations at this time have no private law of their own, the applicable law is always a foreign municipal law. International organizations can appear before municipal courts as plaintiffs, but usually cannot be brought into these courts as defendants without their consent. Here we have a true problem of privileges. This lack of competent tribunal is nowadays being remedied, either

by waiver of immunity or by contractual submission to private arbitration. Theoretically, there is the possibility of the establishment of an international court for private law actions.

While we fully agree with the author's explanations, we would like to make two remarks: The problems of what courts are competent and what law governs also exist outside the realm of the law of international organizations, and even within this realm may sometimes be a little more complicated. On the other hand, a large group of international organizations, in which these problems are of peculiar importance, are not included in this investigation; namely, those international organizations, also created by states through basic treaties, but organized as private law corporations or banks, of which "Eurofima" in Europe and the new International Finance Corporation at Washington are good examples.

The continuous development of international organizations of many types and forms poses many problems of utmost importance, not only for the law of these organizations, but also for the future development of general international law. Yet the literature on international organizations is, to a great extent, purely descriptive, trying to show what they do and not what they are—partly political, partly under the spell of wishful thinking. On the other hand, really legal treatment of international law often neglects the law of international organizations, treating them only as an addition or appendix. What is very necessary is a strictly legal, analytical and systematic study of the law of international organizations. The book under review fulfills these postulates. It is an excellent contribution

JOSEF L. KUNZ

Annuaire Européen (European Yearbook). Vol. III. Published under the auspices of the Council of Europe. The Hague: Martinus Nijhoff, 1957. pp. xix, 534. Index. Gld. 25.50.

Seven articles, 12 documentary chapters, and a comprehensive bibliographical section made up this third issue of what is destined to be an increasingly useful standard work of historical reference. This volume only completes the movement toward European integration through 1955 and so postpones all notice of the European Economic and Atomic Energy Communities¹ until the next issue. One new organ appeared, the European Civil Aviation Conference, which is to meet annually. Drs. B. Landtke and A. H. Robertson, the joint editors, are making their *Yearbook* a documentary record of the progress of European integration, which proliferates so rapidly that only the chronologies and bibliographies are up to date. In the third issue for 1955 they are still publishing treaty text of 1950.

The centripetal movement in Europe is impelled by the Council of Europe (Statute, May 5, 1949) and the Organization for European Economic Co-operation (Convention, April 16, 1948). The European Coal and Steel Community (Treaty, April 18, 1951) fulfills its special function

¹ For texts of the relevant treaties see 51 A.J.I.L. 865-1004 (1957).

through the High Authority, but its Assembly and Court of Justice are common to other "communities" or organizations. Within the system the three states of the Benelux Customs Union have been unifying their economies since 1943, and the Western European Union has existed since 1948 as a political pivot with an extensive social program. Alongside these is the Nordic Council, in which Finland and Iceland participate. As a matter of policy it is hoped to bring the Central Commission for the Navigation of the Rhine, dating back to 1815, into the system. Membership varies from the six states of the "supranational" community treaties, to 14 in the Council of Europe and to 17 in the Organization for European Economic Co-operation; but all have working arrangements with other states, especially the United Kingdom.

Most of the initiative for European integration comes from the Council of Europe and OEEC. The Council in 1955 saw the signing of the first multilateral Convention on Establishment, the tenth instrument in a series concerning human rights, social security, culture, diplomas and patents. In technical fields its creations were producing results. The International Commission on Civil Status was indexing national laws to prepare a convention on that complex subject; the ministers of transport on October 20, 1955, signed a Convention establishing "Eurofima," the European Company for the Financing of Railway Rolling Stock; the European Organization for Nuclear Research (CERN) was pooling the scientific resources of 12 states; and the European Civil Aviation Conference was launched in 1955 by 19 states to work on the problems of intra-European air transport. The Organization for European Economic Co-operation in 1955 improved its European Productivity Agency, which increases in importance, negotiated a European monetary agreement to put convertible exchange on a permanent basis when the European Payments Union ceases, and brought up to date its code of liberalization of trade and invisible transactions, providing a point of departure for both the Common Market Treaty and the "free trade" movement in OEEC itself. Its Customs Co-operation Council has a committee operating under the Convention on the Valuation of Goods for Customs Purposes, and in 1955 it amended its other 1950 Convention on Nomenclature for the Classification of Goods in Customs Tariffs, both conventions being also groundwork for the Common Market Treaty.

The editors of the *Yearbook* publish articles that are excellent in themselves but slight as compared with the material in the extensive bibliographical reviews they include. Henri Rolin of Belgium proposes that the hour of conciliation as a method of pacific settlement has struck for the easing of East-West tensions; his insistence that conciliation has been neglected is given a practical turn by cogent suggestions for its procedural improvement. Ludovici Benvenuti's report to the Council of Europe on "Western Policy towards the U.S.S.R. and the Satellite Countries" and the Council's recommendation are of interest to Americans because they show we are of the same mind on both sides of the Atlantic. The sociological aspects of European integration (B. Landheer) and European cultural policy (Wil-

helm Cornides) are the subjects of two thoughtful articles. Articles on the European Productivity Agency (Edwin Fletcher), the European Organization of Posts and Telecommunication (Edouard Bonnefous) and on "Eurofima" (H. T. Adam, reviewed below), give that intimate understanding that only those associated with the work can reflect.

DENYS P. MYERS.

European Integration. Edited by C. Grove Haines. Baltimore: The Johns Hopkins Press, 1957. pp. xvi, 310. Index. \$5.00.

We have here a collection of papers growing out of a conference held in 1956 at the Bologna Center for International Studies of the Johns Hopkins University. The names of the contributors—Van Zeeland (Preface), Battaglia, Duroselle, Kohn, Malik, Wilgress, Comunafer, Carrington, to name but a few and these not on the basis of any qualitative selectivity—, plus the expert editing of Dr. Haines, would insure a striking volume whatever the subject matter. When, in addition, the crucial current problem of European integration is discussed in various aspects—historical, economic, political, social, and so on—the reader has an extremely valuable introduction to international affairs.

Needless to say, there is no easy optimism in evidence here, nor any cocksure conclusions. Instead we have a thoroughgoing and almost sociological exploration of one of the great central issues of our time.

PITMAN B. POTTER

Société Européenne pour le Financement du Matériel Ferroviaire (Eurofima). By H. T. Adam. The Hague: Martinus Nijhoff, 1957. pp. 21.

Les Établissements Publics Internationaux. By H. T. Adam. Paris: Librairie Générale de Droit et de Jurisprudence, 1957. pp. ix, 323. Index.

In his small essay, which appears in Volume 3 of the European Yearbook, reviewed above, p. 567, Professor H. T. Adam, of the University of Paris and of the Secretariat of the Council of Europe, gives an extremely interesting analysis of the European Society for the Financing of Railroad Equipment. The idea was born out of the necessity to replace European railroad equipment destroyed during the second World War, and of the conviction that it can be done successfully only by European co-operation. Hence on October 20, 1955, a convention was signed approving the establishment of the Society. Its principal task is to find capitalists to lend it 1500 million Swiss francs for the renewal of railroad equipment. The idea of its structure was taken from the American equipment trust, but modified according to the necessities of Europe. For the actual legal structure the Bank for International Settlements served as a precedent, although the structure is in some aspects different from that of the Bank. The stockholders are the railroads of fourteen European countries, most of them members of the Council of Europe, but including also Spain,

Switzerland and Yugoslavia. The governments of which the railroads are the stockholders in the Society are individual guarantors of contracts made by their railroads with Eurofima, but also exercise some control.

We have here, in fact, an international semi-governmental corporation; but in law it is a Swiss corporation, establishment of which is approved by an international convention. It would, therefore, have to be subject to Swiss law. But the Swiss Code of Obligations, and the laws of other participating countries would not allow some of the legal transactions of the Society. Hence, the Statutes annexed to the convention, as a piece of special international legislation, derogate from the corresponding parts of Swiss law and this Swiss law, as so changed by international law, becomes through renvoi applicable as the *lex loci* in the courts of the other participating countries under principles of conflict of laws. There is, further, as part of international law, the Additional Protocol, regulating the relations between Switzerland, as the state of the domicile, and other countries. This Protocol gives the Society special privileges and exonerates it from Swiss taxation. It is a fascinating analysis and reads like an addendum to Philip C. Jessup's *Transnational Law*.

The growing number of institutions such as Eurofima had induced Professor Adam, who in 1949 wrote an excellent book on the European Organization for Economic Co-operation,¹ to write a book on what he calls, by analogy to the *Établissements publics* of French administrative law, *Établissements Publics Internationaux*; we may perhaps say in English: *Public International Corporations*, or *Public International Authorities*. They are particularly frequent in Europe. The Annex (pp. 199-312) gives the basic documents of ten such institutions, but the text (pp. 1-197) deals with many more. Chapter VI analyzes some of the newest institutions of this type, including the quasi-universal International Finance Corporation, the Statutes of which were adopted by the Board of the International Bank for Reconstruction and Finance on July 24, 1956, or—on a supranational basis—the *Entreprises Communes* of the Euratom Treaty.

Our era, the author states, is the era of international organizations. But within them a distinction imposes itself—the distinction between international organizations, properly speaking, and the International Public Authorities. The author recognizes that the development of these institutions is in evolution, but holds that they demonstrate progress along three lines: in international law there is progress from treaty to institution; in international organization, they have authority vis-à-vis the states in question; and thirdly, they have individuals as the direct beneficiaries of their functions.

It is on their distinction from international organizations, properly speaking, and on their similarity with the *établissements publics* of municipal law, that the author bases the definition of these new institutions. For he fully recognizes that they are different as to activities, as to juridical regime, as to powers and means of functioning. It is his task to find their common characteristics for the purpose of legal construction.

¹ See this reviewer's comments in 44 A.J.I.L. 228-229 (1950).

International organizations, properly speaking, whether regional or quasi-universal, whether general or specialized, whether international or supra-national, are organs of the international co-operation of sovereign states. But these new institutions are public international services, founded by two or more states, independent of any international organization; they fulfil a task of material execution or regulation for the benefit of individuals; they have contracts and contacts with an indefinite number of individuals; they are operational units, having a legal and material autonomy vis-à-vis the states in question, and proceed with their own materials, agents, resources. They are independent vis-à-vis governments, but are often subject to the municipal law of the state of domicile, in both these respects different from international organizations. Hence, neither the original Bank for International Settlements, the present International Atomic Energy Agency, nor the European supra-national Coal and Steel Community belongs here. Although international organizations often perform tasks of material execution, they do so as a part of normal international organizations. We would like to add here that these new institutions are also legally very different from organizations based on a contract between a sovereign state and one or more foreign private corporations, such as the Suez Canal Company or the new Iran Oil Consortium, although here also similar problems as, *e.g.*, the problem of the applicable law, may arise. For in spite of all distinctions from international organizations, properly speaking, the new institutions have one thing in common with them: they are founded by sovereign states; their legal basis is not a contract of private law, but a treaty.

These new institutions can be classified according to several criteria. According to the degree of internationalization, there are institutions of international interest, but without an international regime or organ, such as the St. Lawrence Seaway; there are institutions of international interest and with a certain international regime, such as the Luxembourg Railway or the Tunnel under Mont Blanc; finally, there are, the full-fledged institutions, such as Eurofima. According to the nature of their activities they are either regulatory authorities, such as the Communist Danube Commission, or organs either for construction—which may be called international public works—or for exploitation, or for both. According to their nature they may be under the regime of public or of private law.

The reality of power of an international organ lies not in the function but in an independent will superior to that of a member state, with no possibility of a veto by a single member; hence the possibility of making by majority vote decisions which are legally binding and which have a definitive and executive character. But there are institutions with restricted or imperfect powers.

As to the determination of the applicable law, all these institutions are in the first place, governed by international law: the treaty which forms the legal basis, and the statutes which are often annexed to the treaty. They may have immunity from national law (such as the Danube Commission); they may have the status of a private corporation of the state of

their domicile and be subject secondarily to the municipal law of the state of domicile. As treaty and statutes (of the rank of international law) never suffice for the innumerable contracts these institutions have to make, recourse to municipal law may be necessary: the law of the state of domicile, as changed by treaty and statutes, and the principles of conflict of laws.

Just as functions of construction and exploitation or regulation directly for individuals and proper powers are characteristic of these institutions, thus also proper resources, financial autonomy. They do not depend on the discretion of the member states, on the quotas to be paid by them.

The work of Professor Adam is an analytical work in a new field and therefore has a pioneering character. He brings to his task an extraordinary detailed knowledge of these new and complicated materials involving foremost institutions only recently set up in Europe, which are not particularly well known in this country. He brings to his task the fine analytical talent of a good jurist, absolute scientific objectivity, clear distinction between what the law is and mere proposals *de lege ferenda* or critiques of the positive law. In the field of international organization much work has to be done on analytical lines. In this respect Professor Adam's work is a very valuable and welcome contribution. We fully agree with the last words with which M. P. H. Teitgen, a former Vice Premier of France, closes his preface: "*Voici donc un bon auteur pour un beau sujet.*"

JOSEF L. KUNZ

The United States Attorneys General and International Law. By David R. Deener. The Hague: Martinus Nijhoff, 1957. pp. xiv, 415. Gld. 26.50.

It will doubtless come as a surprise to those of us whose first text on international law was Moore's *Digest* to find how many of the State Department documents had their origin in opinions of the Attorney General. Somehow we had thought that the functions of the Attorney General were confined to Constitutional law. Professor Deener, in a careful and scholarly examination of the background of cases and incidents, shows us how significant has been the part played by opinions of the Attorneys General.

The list of chapters in Part B, Opinions on the Law of Nations, reads not unlike the table of contents of a standard textbook—relation to municipal law, international status, territory and nationality, jurisdiction, diplomatic and consular relations, international agreements, international reclamation, neutrality, and war; and the cases and incidents cited are the classic ones of the American textbook.

Part A, Legal Advice, is devoted to an analysis of the function of the Attorney General, the requests that come to him for an opinion, the formulation of the opinion, its legal force, its practical effect, and the political pressure under which opinions are given, this last chapter on "Politics" opening with the pleasant story of President Jackson calling upon his Attorney General to "find a law authorizing this action or I

shall find an Attorney General who will." If the author's discussion of the "realist" school may seem academic in places and somewhat remote from international law, it makes good reading just the same. The conclusion is reached that "on the whole, the interpretations and applications of international law made by the Attorneys General find support in the writings of publicists and in actual state practice," and are therefore not "necessarily directed to the implementation of policy," as suggested by the International Law Commission.

This is a stimulating and instructive volume which more advanced students interested in the origins of foreign policy in relation to international law will appreciate.

C. G. FENWICK

An Introduction to American Foreign Policy. By Edgar S. Furniss, Jr., and Richard C. Snyder. New York: Rinehart and Co., 1955. pp. xii, 252. Index. \$3.00.

Dynamics of International Relations. By Ernst B. Haas and Allen S. Whiting. New York: McGraw-Hill Book Co., 1956. pp. xvi, 557. Index. \$6.00.

An Introduction to American Foreign Policy offers much realistic background on the subject in regard to its historical, social and political setting, reaching from 1798 to the present time. It includes an introductory chapter on "The Study of Foreign Policy" which deals with the nature of international politics, national interests, objectives and techniques and some very useful "criteria for judging the content and formulation of foreign policy." The concluding chapter deals discerningly with "The Problem of Policy Making." The selected bibliographies attached to the various chapters have been collected with obvious care and success.

Professors Haas and Whiting endeavor "to work out a different methodology for the study of international relations, as well as to provide the student with a basic text." They "have attempted to synthesize the study of political behavior and social action with an analysis of international relations as one manifestation of group aspirations. . . . Groups, élites, and, to a lesser extent, nations are the primary actors studied. The scheme of international affairs which emerges is thus a compendium of the ways in which shapers and conditioners of policy view their mutual interrelations, in terms of their native ideological and institutional frameworks" (pp. vii-viii). The authors deserve full credit for their endeavor to apply the behavioral approach to the study of international relations, though the results leave the reviewer, for one, with many more questions and doubts than with new answers and insights.

Many chapters of the book are good, some very good and some excellent, but most of them do not show any impact of the behavioral approach. For instance, the two standard-type chapters on international law simply bow out with the statement that international law "ranks as yet another of the means available to élites in their efforts to realize ends abroad"

(p. 426). The chapter on American Foreign Policy-Making is very interesting, and to some extent very enlightening—for instance when dealing with “the contrast between the formulation of the European Recovery Program and post-1944 policy in the Far East” (pp. 280–82, 287–89). This chapter is indicative of additional opportunities for understanding which may be reached through the behavioral approach. Other chapters show more clearly the limitations of the method and even its dangers when it is forced into a Procrustean bed. An example is the chapter on Nazi Germany which is full of misconceptions and omits many essential factors and, in addition allows itself some contradictions. For the treatment of the Third Reich one cannot claim altogether the excuse which the authors put forward—as a correct general proposition—that “empirical material is frequently unavailable or inaccessible, especially in the case of under-developed countries and totalitarian regimes” (p. viii).

JOHN BROWN MASON

Allied Wartime Diplomacy: A Pattern in Poland. By Edward J. Rozek. New York: John Wiley and Sons, 1958. pp. xiii, 481. Index. \$6.95.

The Fate of East Central Europe: Hopes and Failures of American Foreign Policy. By Stephen D. Kertesz (editor). Notre Dame: University of Notre Dame Press, 1956. pp. xii, 463. Index. \$6.25.

Mr. E. J. Rozek, a naturalized American citizen of Polish birth, has made a true contribution towards a better understanding of the wartime story of Poland by inserting in his book long extracts from documents hitherto unknown. The former Prime Minister, S. Mikolajczyk, opened to him the archives of the Polish Government-in-exile as well as his private files. Thus many Polish records of conversations held by the wartime Polish leaders with the British, American, and Soviet governments could be printed for the first time. The publication of the Polish documents does not change the basic image of what happened, but adds many interesting data.

The author's error consists in his detaching the Polish question from the whole complex of Western-Soviet relations during the era of the “Grand Alliance,” without referring to other problems, political and military, which preoccupied the Western Powers at the time. This faulty method of investigation has brought about unexpected results. The author says that he intended to make a contribution to a better understanding of Soviet foreign policy; he has written instead a harsh indictment of Prime Minister Churchill, Foreign Secretary Eden, British political parties and press, and to a much lesser extent of President Roosevelt and his advisers and collaborators. Although Stalin's duplicity and imperialism are not forgotten, the reader is led to believe that Churchill was the other black character in the Polish tragedy, who, without misgivings, sold Polish territory and independence to a totalitarian Russia. It is true that Churchill, as practically everyone else in the West, succumbed at that time to the belief that Stalin had only limited objectives. But the same

Churchill unsuccessfully urged in 1943 the undertaking of military operations in the Balkans and in 1944 in the Danubian area in order to introduce British and American troops in as many Eastern European countries as feasible before the Soviet soldiers could occupy them. The author did not use the Soviet documents, although they have been published.

Despite its shortcomings the book is a timely reminder of the earnest Western efforts during the last war to lay the foundations of mutual trust for postwar co-operation with the U.S.S.R. If this policy proved to be sterile, is there any solid reason for the present wave of wishful thinking?

The collective work edited by Professor S. D. Kertesz is a survey of American foreign policy towards Eastern Europe and of the developments in each of the countries of this area after their gradual absorption within the Soviet orbit. Because the book was written by no less than seventeen authors, there is an unavoidable lack of unity of thought; however, the variety of standpoints is interesting in itself and practically all chapters are written competently.

The chapter on American policy in 1941-47 by Professor Philip E. Mosely fully restores the over-all perspective of which Mr. Rozek lost sight. Professor Mosely explains why the American and British governments felt in 1941-45 that they had no effective means to determine the postwar fate of Eastern Europe. He states briefly the main reason:

The experience of World War II suggests that the only way in which the United States could have exercised a determining influence on the postwar status of East Central Europe was to appear there with large military force. (p. 61.)

This is the main key to a better understanding of not only the American and British wartime, but also postwar, policies.

The slogan of liberating Eastern Europe, so popular in 1952-53, finally foundered amidst the tragic Hungarian events because it was propounded without any relation to the nuclear stalemate that had frozen the European *status quo*. Professor Mosely laconically formulates the conclusion: "... hope, divorced from power, is not a policy." (p. 74.) Assuming that another author, Mr. Robert F. Byrnes, is right in interpreting the current American policy as not attempting "the forceful ejection of Soviet authority from East Central Europe" (p. 95), an interpretation confirmed by the Hungarian events, the sad but unavoidable conclusion is that this authority is there to stay, barring unforeseeable developments within the Soviet Union itself.

The book had been published before the events that shook Hungary and Poland. This "unfortunate" publication date makes the chapter on Hungary incomplete and that on Poland inadequate for the understanding of the present situation.

Mr. Ivo Duchacek, writing about Czechoslovakia, sums up in these sad words the tragic plight of the whole area dominated by overwhelming Soviet power:

Czechoslovakia . . . resembles a prisoner whose life, outlook, and even death are predetermined by the four walls of his cell . . . he cannot go beyond his four walls . . . he can only commit suicide by breaking his head against the wall." (pp. 217-218.)

If a miracle some day should cause the four walls to crumble, the editor, Dr. S. D. Kertesz, would be right in his view that the only way for Eastern Europe to escape the peril of being imprisoned again inside some new four walls would be to build a federal house as a common shelter for all these hapless nations deprived of independence at a time when Asians and Africans are recovering their own.

W. W. KULSKI

The Allied Blockade of Germany 1914-1916. By Marion C. Siney. Ann Arbor: University of Michigan Press, 1957. pp. ix, 339. Index. \$6.50.

This work is a factual and policy study of the economic warfare carried on by the Allies to starve the Central Powers and ruin their economic life in World War I. The effort took four principal forms: the right of visit and search, and capture of contraband, reprisal measures against Germany's illegal acts, exercise of certain sovereign rights over persons and property within Allied jurisdiction, purely policy measures against neutral states and their citizens by restricting trade with the belligerents. The actual operation of these four measures is emphasized and their legality is lightly touched upon. The period covered ends in 1916. A second volume for 1917-1919 is in contemplation.

As a background to this vast operation Chapter I reviews the law and practice of belligerents since 1856, especially in respect of contraband and blockade. Such was the hold of traditional law and practice on belligerents in 1914 that the Allies were slow in realizing that former methods of intercepting enemy trade would not operate efficiently against the Central Powers, especially because of the fringe of neutral countries with or through which such trade was carried on. While patrols stopped and searched thousands of vessels at the North Sea and Channel approaches under the right to intercept contraband, it was clear that this interruption of enemy trade was not tight enough, though German shipping was soon swept from the seas or sought refuge in neutral ports.

It was the German declaration, February 4, 1915, of submarine warfare and the inability or refusal to live up to the rules of search and capture that gave excuse to the Allies to issue the Reprisal Orders of March, 1915. For the first time it was thus attempted to snuff out all German trade, contraband and non-contraband, exports and imports alike. Though a cordon of vessels enforced these Orders, no blockade was declared, the penalties were different, the aim and purpose were more inclusive. Thus, as a practical matter, the Allies freed themselves of the restrictions of the Declaration of Paris and the Declaration of London, while expanding the theory of continuous voyage and the contraband lists. The Allies made no pretense that these Orders were in accord with the rules of international law governing blockade and contraband. They frankly undertook

there is a reprisal against Germany's illegal methods of conducting submarine warfare.

As a matter of sovereign right, the Allies prohibited their nationals from giving aid through trade or otherwise to the enemy and prohibited the use of their products—raw materials or manufactured products or foodstuffs—except on condition that the use thereof or the products manufactured therefrom would not inure to the benefit of the enemy. Thus forced neutrals who desired these Allied products to make agreement as to their use and disposition. On the same ground of sovereign right the censorship of mail was gradually developed first as to parcel mail, which was used to transmit contraband, and later as to letter mail. The neutrals protested vigorously and cited, among other things, the Hague Convention and the Postal Convention. The reply was that the former convention had not been ratified by all the belligerents and that the latter convention was suspended by the state of war. In essence, the censorship was based on the sovereign right of jurisdiction over ships and mails coming into Allied ports voluntarily or otherwise and enjoying facilities of the local postal service. In the end, they had little choice but to comply in order to avoid delays and detentions of cargoes and ships.

The data obtained in censorship was used in making up a Blacklist of persons resident in foreign countries of enemy nationality or "enemy association" with whom persons domiciled in Allied countries were prohibited from trading. Protests of neutral countries were answered to the effect that the measure was purely a municipal prohibition on persons in the Allied countries and did not condemn neutrals or their property. It simply withheld facilities of Allied trade from persons who were assisting the enemy.

Whatever could not be accomplished by the exercise of belligerent or sovereign right, was secured by acts of pure policy, for which there was no legal justification. This was accomplished by negotiations with the neutral governments or their citizens. These negotiations were a delicate matter. The neutrals supplied the Allies with certain essential native products and the Allies needed the benefit of this profitable business to pay war expenses. Too severe restrictions on this trade with the enemy might cause them to withhold these products or invite invasion by the Central Powers. The neutrals were driven to the control of their trade by the sovereign right of government embargoes as a legal defense and protection of their existence and by allowing trade agreements between the Allies and private neutral shipping companies and producers. All this came to a kind of rationing by agreement of the amounts of each kind of commodity that went to the northern neutrals by detaining all goods beyond the amount required by them in normal times. As something of a counter-irritant to the neutrals, the Allies devised a system of navicerting by which the exporter would submit the details of the cargo and receive an approval or a refusal before the shipment was made.

Eventually the Allies awakened to the fact that abnormal amounts of the native foodstuffs of the neutrals were going to the Central Powers at the

expense of the Allies. To cut off this aid to the enemy, the Allies attempted by various threats and pressures to negotiate purchase agreements with neutral governments or their subjects to buy as much as possible of these products on the market or otherwise. This purchasing policy was expensive and of varying success, because the neutrals feared German reprisals or invasion.

The foregoing states in rough outline the various measures instituted by the Allies in developing the undeclared "blockade" of the Central Powers. Dr. Siney has given, in considerable detail, the history and effect of these measures (with references to sources), which cannot be reviewed or summarized here. The volume is a well-written result of her careful research and will stand as an authoritative and standard reference work on the subject.

L. H. WOOLSEY

Treaties and Agreements Between the Republic of China and Other Powers, 1929-1954. Together with Certain International Documents Affecting the Interests of the Republic of China. Compiled and edited by Yin Cheng Chen. Washington, D. C.: Sino-American Publishing Service, 1957. pp. xiv, 491. Index. \$12.00.

Workers in the fields of international law and international relations welcome the appearance of any collection of documents which will facilitate and simplify the tasks of research, analysis, synthesis and citation which fall to their lot. Many who are especially concerned with contemporary Far Eastern politics will be grateful to Dr. Yin Cheng Chen and those to whom he acknowledges indebtedness—including the United States Department of State and the Ministry of Foreign Affairs of the Republic of China—for the effort which has gone into the producing of the collection presented in this volume.

There have long been available the compilations of China's Treaties published from time to time by the *North China Herald, Ltd.*, at Shanghai; those published by the Inspectorate General of (Chinese Maritime) Customs at Shanghai; the compilation—Korean treaties included—made by W. W. Rockhill and published by the United States Government Printing Office; the monumental compilation, *Treaties and Agreements with and Concerning China, 1894-1919*, made by John V. A. MacMurray, and the continuation thereof for the years 1919-1929 made by the Division of International Law of the Carnegie Endowment for International Peace, and published, as had been the MacMurray volumes, in Washington, D. C., by that Endowment; and, always, *Hertslet's*. None of these, however, serves, as regards period, the purpose that will be served by Dr. Chen's compilation.

This compilation deals with and covers the period 1929-1954. Its compiler and editor, a Chinese scholar who served for some time in China's Foreign Office, has endeavored to get together all the documents possible, within the category described in the title, "for the ready reference" of students and governments. As he states, "The present collection is, in a

sense, a continuation of" the compilations published by the Carnegie Endowment. In some respects it is regrettable that it does not overlap the last of those by one year, 1928, the year in which China's National Government, firmly seated, was first accorded diplomatic recognition. It is gratifying that it extends to and includes the Mutual Defense Treaty of December 4, 1954 (ratifications exchanged on March 3, 1955), between the Republic of China and the United States, and, with it, the Exchange of Notes of December 10, 1954.

Finally, Dr. Chen has brought together some 132 documents, including some not previously published. Even at that, he states, some fugitive texts have not been netted. Where the originals have appeared with English texts, those texts have been reproduced. Where such texts are lacking, translations into English have been made. The documents presented are arranged in chronological sequence and are so listed in a table of contents. Unfortunately not provided are the annotating and cross-referencing which are greatly to be desired in such a work. One great virtue of this collection is that it appears in one volume of standard size— $5\frac{1}{2} \times 8\frac{1}{2}$ —which makes it easy to handle. The book is well printed, is equipped with a brief index, and should be useful.

STANLEY K. HORNBLICK

Interamerican Law of Fisheries: An Introduction with Documents. By S. A. Bayitch. (Published for the International Law Program, School of Law, University of Miami.) New York: Oceana Publications, 1957. pp. 117. Index. \$3.75.

This timely little book brings together in convenient form many of the provisions of constitutions, acts and decrees of the American Republics bearing upon the matter of high-seas fisheries. For the most part pertinent treaties are merely listed and cited, although the 1956 consolidated text of the conventions previously signed by Chile, Ecuador and Peru is introduced in English translation. There are set forth a text of Resolution IX of the Ninth Conference (Bogotá, 1948); Resolution XIX of the Second Meeting of the Council of Jurists (Buenos Aires, 1953); Resolution LXXXIV of the Tenth Inter-American Conference (Caracas, 1954); Resolution XIII of the Third Meeting of the Inter-American Council of Jurists (Mexico City, 1956); and Resolution I of the Inter-American Specialized Conference on "Conservation of Natural Resources: The Continental Shelf and Marine Waters" (Ciudad Trujillo, 1956). The author omitted from the collection Resolution XIV of the Third Meeting of the Inter-American Council of Jurists (Mexico City, 1956), which gave Resolution XIII (Principles of Mexico on the Juridical Regime of the Sea) character as a "preparatory study" for the Inter-American Specialized Conference held a few weeks later in Ciudad Trujillo.

In addition, there is included in the compilation the text (save for the Introduction) of the Report of the International Technical Conference on the Conservation of the Living Resources of the Sea (Rome, May 10, 1955).

prepared for the use of the International Law Commission. Also set forth are certain articles of the International Law Commission's Draft on the "Law of the Sea" and the Commission's Commentary thereon.

Finally, there is set forth the resolution adopted by the Sixth Committee of the General Assembly of the United Nations (December 20, 1956), upon the receipt of the Report of the International Law Commission covering the work of its 8th Session. In Paragraph 28 of the Report, the International Law Commission recommended that there be convoked a conference of plenipotentiaries to examine the "Law of the Sea," taking account not only of the legal, but also of the technical, biological, economic and political aspects of the problem, and to embody the results of this work in one or more international conventions or such other instruments as it might deem appropriate. In its resolution approving the calling of such a conference, the General Assembly of the United Nations also included the question of free access to the sea of land-locked countries. The Secretary General of the United Nations convoked such a Conference, which met in Geneva, Switzerland, from February 24 to April 27, 1958.

While a considerable portion of this compilation sets forth unilateral and multilateral acts not of such a character as to bear the imprint of international law, this is not to say that the book does not contain a useful collection of documents bearing upon the subject of fisheries and related matters. Certain of these documents, as, for example, the Report of the 1955 Rome Conference, an historic Conference on the Conservation of the Living Resources of the Sea, are not easily available to many persons interested in the subject of fisheries conservation.

MARJORIE M. WHITEMAN

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* Mention here neither assures nor precludes later review.

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OFFICIAL DOCUMENTS

CONVENTION ON DAMAGE CAUSED BY FOREIGN AIRCRAFT TO THIRD PARTIES ON THE SURFACE

Signed at Rome, October 7, 1952; in force February 4, 1953

THE STATES SIGNATORY to this Convention,

MOTIVED by a desire to ensure adequate compensation for persons who suffer damage caused on the surface by foreign aircraft, while limiting in a reasonable manner the extent of the liabilities incurred for such damage in order not to hinder the development of international civil air transport, and also

CONVINCED of the need for unifying to the greatest extent possible, through an international convention, the rules applying in the various countries of the world to the liabilities incurred for such damage,

HAVE APPOINTED to such effect the undersigned Plenipotentiaries who, duly authorised,

HAVE AGREED AS FOLLOWS:

CHAPTER I

PRINCIPLES OF LIABILITY

ARTICLE 1

1. Any person who suffers damage on the surface shall, upon proof only that the damage was caused by an aircraft in flight or by any person or thing falling therefrom, be entitled to compensation as provided by this Convention. Nevertheless there shall be no right to compensation if the damage is not a direct consequence of the incident giving rise thereto, or if the damage results from the mere fact of passage of the aircraft through the airspace in conformity with existing air traffic regulations.

2. For the purpose of this Convention, an aircraft is considered to be in flight from the moment when power is applied for the purpose of actual take-off until the moment when the landing run ends. In the case of an aircraft lighter than air, the expression "in flight" relates to the period from the moment when it becomes detached from the surface until it becomes again attached thereto.

ARTICLE 2

1. The liability for compensation contemplated by Article 1 of this Convention shall attach to the operator of the aircraft.

International Civil Aviation Organization, Doc. 7364. The convention has been ratified on behalf of Canada, Egypt, Luxembourg, Pakistan, and Spain, and adhered to by Ecuador.

2. (a) For the purposes of this Convention the term "operator" shall mean the person who was making use of the aircraft at the time the damage was caused, provided that if control of the navigation of the aircraft was retained by the person from whom the right to make use of the aircraft was derived, whether directly or indirectly, that person shall be considered the operator.

(b) A person shall be considered to be making use of an aircraft when he is using it personally or when his servants or agents are using the aircraft in the course of their employment, whether or not within the scope of their authority.

3. The registered owner of the aircraft shall be presumed to be the operator and shall be liable as such unless, in the proceedings for the determination of his liability, he proves that some other person was the operator and, in so far as legal procedures permit, takes appropriate measures to make that other person a party in the proceedings.

ARTICLE 3

If the person who was the operator at the time the damage was caused had not the exclusive right to use the aircraft for a period of more than fourteen days, dating from the moment when the right to use commenced, the person from whom such right was derived shall be liable jointly and severally with the operator, each of them being bound under the provisions and within the limits of liability of this Convention.

ARTICLE 4

If a person makes use of an aircraft without the consent of the person entitled to its navigational control, the latter, unless he proves that he has exercised due care to prevent such use, shall be jointly and severally liable with the unlawful user for damage giving a right to compensation under Article 1, each of them being bound under the provisions and within the limits of liability of this Convention.

ARTICLE 5

Any person who would otherwise be liable under the provisions of this Convention shall not be liable if the damage is the direct consequence of armed conflict or civil disturbance, or if such person has been deprived of the use of the aircraft by act of public authority.

ARTICLE 6

1. Any person who would otherwise be liable under the provisions of this Convention shall not be liable for damage if he proves that the damage was caused solely through the negligence or other wrongful act or omission of the person who suffers the damage or of the latter's servants or agents. If the person liable proves that the damage was contributed to by the negligence or other wrongful act or omission of the person who suffers the

damage, or of his servants or agents, the compensation shall be reduced to the extent to which such negligence or wrongful act or omission contributed to the damage. Nevertheless there shall be no such exoneration or reduction if, in the case of the negligence or other wrongful act or omission of a servant or agent, the person who suffers the damage proves that his servant or agent was acting outside the scope of his authority.

2. When an action is brought by one person to recover damages arising from the death or injury of another person, the negligence or other wrongful act or omission of such other person, or of his servants or agents, shall also have the effect provided in the preceding paragraph.

ARTICLE 7

When two or more aircraft have collided or interfered with each other in flight and damage for which a right to compensation as contemplated in Article 1 results, or when two or more aircraft have jointly caused such damage, each of the aircraft concerned shall be considered to have caused the damage and the operator of each aircraft shall be liable, each of them being bound under the provisions and within the limits of liability of this Convention.

ARTICLE 8

The persons referred to in paragraph 3 of Article 2 and in Articles 3 and 4 shall be entitled to all defences which are available to an operator under the provisions of this Convention.

ARTICLE 9

Neither the operator, the owner, any person liable under Article 3 or Article 4, nor their respective servants or agents, shall be liable for damage on the surface caused by an aircraft in flight or any person or thing falling therefrom otherwise than as expressly provided in this Convention. This rule shall not apply to any such person who is guilty of a deliberate act or omission done with intent to cause damage.

ARTICLE 10

Nothing in this Convention shall prejudice the question whether a person liable for damage in accordance with its provisions has a right of recourse against any other person.

CHAPTER II

EXTENT OF LIABILITY

ARTICLE 11

1. Subject to the provisions of Article 12, the liability for damage giving a right to compensation under Article 1, for each aircraft and incident in respect of all persons liable under this Convention, shall not exceed:

- (a) 500 000 francs for aircraft weighing 1000 kilogrammes or less;
- (b) 500 000 francs plus 400 francs per kilogramme over 1000 kilogrammes for aircraft weighing more than 1000 but not exceeding 6000 kilogrammes;
- (c) 2 500 000 francs plus 250 francs per kilogramme over 6000 kilogrammes for aircraft weighing more than 6000 but not exceeding 20 000 kilogrammes;
- (d) 6 000 000 francs plus 150 francs per kilogramme over 20 000 kilogrammes for aircraft weighing more than 20 000 but not exceeding 50 000 kilogrammes;
- (e) 10 500 000 francs plus 100 francs per kilogramme over 50 000 kilogrammes for aircraft weighing more than 50 000 kilogrammes.

2. The liability in respect of loss of life or personal injury shall not exceed 500 000 francs per person killed or injured.

3. "Weight" means the maximum weight of the aircraft authorised by the certificate of airworthiness for takeoff, excluding the effect of lifting gas when used.

4. The sums mentioned in francs in this article refer to a currency unit consisting of 65½ milligrammes of gold of millesimal fineness 900. These sums may be converted into national currencies in round figures. Conversion of the sums into national currencies other than gold shall, in case of judicial proceedings, be made according to the gold value of such currencies at the date of the judgment, or, in cases covered by Article 14, at the date of the allocation.

ARTICLE 12

1. If the person who suffers damage proves that it was caused by a deliberate act or omission of the operator, his servants or agents, done with intent to cause damage, the liability of the operator shall be unlimited; provided that in the case of such act or omission of such servant or agent, it is also proved that he was acting in the course of his employment and within the scope of his authority.

2. If a person wrongfully takes and makes use of an aircraft without the consent of the person entitled to use it, his liability shall be unlimited.

ARTICLE 13

1. Whenever, under the provisions of Article 3 or Article 4, two or more persons are liable for damage, or a registered owner who was not the operator is made liable as such as provided in paragraph 3 of Article 2, the persons who suffer damage shall not be entitled to total compensation greater than the highest indemnity which may be awarded under the provisions of this Convention against any one of the persons liable.

2. When the provisions of Article 7 are applicable, the person who suffers the damage shall be entitled to be compensated up to the aggregate of the limits applicable with respect to each of the aircraft involved, but no operator shall be liable for a sum in excess of the limit applicable to his aircraft unless his liability is unlimited under the terms of Article 12.

ARTICLE 14

If the total amount of the claims established exceeds the limit of liability applicable under the provisions of this Convention, the following rule shall apply, taking into account the provisions of paragraph 2 of Article 11:

(a) If the claims are exclusively in respect of loss of life or personal injury or exclusively in respect of damage to property, such claims shall be reduced in proportion to their respective amounts.

(b) If the claims are both in respect of loss of life or personal injury and in respect of damage to property, one half of the total sum distributable shall be appropriated preferentially to meet claims in respect of loss of life and personal injury and, if insufficient, shall be distributed proportionately between the claims concerned. The remainder of the total sum distributable shall be distributed proportionately among the claims in respect of damage to property and the portion not already covered of the claims in respect of loss of life and personal injury.

CHAPTER III

SECURITY FOR OPERATOR'S LIABILITY

ARTICLE 15

1. Any Contracting State may require that the operator of an aircraft registered in another Contracting State shall be insured in respect of his liability for damage sustained in its territory for which a right to compensation exists under Article 1 by means of insurance up to the limits applicable according to the provisions of Article 11.

2. (a) The insurance shall be accepted as satisfactory if it conforms to the provisions of this Convention and has been effected by an insurer authorised to effect such insurance under the laws of the state where the aircraft is registered or of the state where the insurer has his residence or principal place of business, and whose financial responsibility has been verified by either of those states.

(b) If insurance has been required by any state under paragraph 1 of this article, and a final judgment in that state is not satisfied by payment in the currency of that state, any Contracting State may refuse to accept the insurer as financially responsible until such payment, if demanded, has been made.

3. Notwithstanding the last preceding paragraph the state overflown may refuse to accept as satisfactory insurance effected by an insurer who is not authorised for that purpose in a Contracting State.

4. Instead of insurance, any of the following securities shall be deemed satisfactory if the security conforms to Article 17:

(a) a cash deposit in a depository maintained by the Contracting State where the aircraft is registered or with a bank authorised to act as a depository by that state;

(b) a guarantee given by a bank authorised to do so by the Contracting State where the aircraft is registered, and whose financial responsibility has been verified by that state;

(c) a guarantee given by the Contracting State where the aircraft is registered, if that state undertakes that it will not claim immunity from suit in respect of that guarantee.

5. Subject to paragraph 6 of this article, the state overflown may also require that the aircraft shall carry a certificate issued by the insurer certifying that insurance has been effected in accordance with the provisions of this Convention, and specifying the person or persons whose liability is secured thereby, together with a certificate or endorsement issued by the appropriate authority in the state where the aircraft is registered or in the state where the insurer has his residence or principal place of business certifying the financial responsibility of the insurer. If other security is furnished in accordance with the provisions of paragraph 4 of this article, a certificate to that effect shall be issued by the appropriate authority in the state where the aircraft is registered.

6. The certificate referred to in paragraph 5 of this article need not be carried in the aircraft if a certified copy has been filed with the appropriate authority designated by the state overflown or, if the International Civil Aviation Organization agrees, with that Organization, which shall furnish a copy of the certificate to each Contracting State.

7. (a) Where the state overflown has reasonable grounds for doubting the financial responsibility of the insurer, or of the bank which issues a guarantee under paragraph 4 of this article, that state may request additional evidence of financial responsibility, and if any question arises as to the adequacy of that evidence the dispute affecting the states concerned shall, at the request of one of those states, be submitted to an arbitral tribunal which shall be either the Council of the International Civil Aviation Organization or a person or body mutually agreed by the parties.

(b) Until this tribunal has given its decision the insurance or guarantee shall be considered provisionally valid by the state overflown.

8. Any requirements imposed in accordance with this article shall be notified to the Secretary General of the International Civil Aviation Organization who shall inform each Contracting State thereof.

9. For the purpose of this article, the term "insurer" includes a group of insurers, and for the purpose of paragraph 5 of this article, the phrase "appropriate authority in a state" includes the appropriate authority in the highest political subdivision thereof which regulates the conduct of business by the insurer.

ARTICLE 16

1. The insurer or other person providing security required under Article 15 for the liability of the operator may, in addition to the defences available to the operator, and the defence of forgery, set up only the following defences against claims based on the application of this Convention:

(c) that the damage occurred after the security ceased to be effective. However, if the security expires during a flight, it shall be continued in force until the next landing specified in the flight plan, but no longer than twenty-four hours; and if the security ceases to be effective for any reason other than the expiration of its term, or a change of operator, it shall be continued until fifteen days after notification to the appropriate authority of the state which certifies the financial responsibility of the insurer or the guarantor that the security has ceased to be effective, or until effective withdrawal of the certificate of the insurer or the certificate of guarantor, if such a certificate has been required under paragraph 5 of Article 15, whichever is the earlier;

(d) that the damage occurred outside the territorial limits provided for by the security, unless flight outside of such limits was caused by *force majeure*, assistance justified by the circumstances, or an error in piloting, operation or navigation.

2. The state which has issued or endorsed a certificate pursuant to paragraph 5 of Article 15 shall notify the termination or cessation, otherwise than by the expiration of its term, of the insurance or other security to the interested Contracting States as soon as possible.

3. Where a certificate of insurance or other security is required under paragraph 5 of Article 15 and the operator is changed during the period of the validity of the security, the security shall apply to the liability under this Convention of the new operator, unless he is already covered by other insurance or security or is an unlawful user, but not beyond fifteen days from the time when the insurer or guarantor notifies the appropriate authority of the state where the certificate was issued that the security has become ineffective or until the effective withdrawal of the certificate of the insurer if such a certificate has been required under paragraph 5 of Article 15, whichever is the shorter period.

4. The continuation in force of the security under the provisions of paragraph 1 of this article shall apply only for the benefit of the person suffering damage.

5. Without prejudice to any right of direct action which he may have under the law governing the contract of insurance or guarantee, the person suffering damage may bring a direct action against the insurer or guarantor only in the following cases:

(a) where the security is continued in force under the provisions of paragraph 1 (a) and (b) of this article;

(b) the bankruptcy of the operator.

6. Excepting the defences specified in paragraph 1 of this article, the insurer or other person providing security may not, with respect to direct actions brought by the person suffering damage based upon application of this Convention, avail himself of any grounds of nullity or any right of retroactive cancellation.

7. The provisions of this article shall not prejudice the question whether the insurer or guarantor has a right of recourse against any other person.

ARTICLE 17

1. If security is furnished in accordance with paragraph 4 of Article 15, it shall be specifically and preferentially assigned to payment of claims under the provisions of this Convention.

2. The security shall be deemed sufficient if, in the case of an operator of one aircraft, it is for an amount equal to the limit applicable according to the provisions of Article 11, and in the case of an operator of several aircraft, if it is for an amount not less than the aggregate of the limits of liability applicable to the two aircraft subject to the highest limits.

3. As soon as notice of a claim has been given to the operator, the amount of the security shall be increased up to a total sum equivalent to the aggregate of:

(a) the amount of the security then required by paragraph 2 of this Article, and

(b) the amount of the claim not exceeding the applicable limit of liability.

This increased security shall be maintained until every claim has been disposed of.

ARTICLE 18

Any sums due to an operator from an insurer shall be exempt from seizure and execution by creditors of the operator until claims of third parties under this Convention have been satisfied.

CHAPTER IV

RULES OF PROCEDURE AND LIMITATION OF ACTIONS

ARTICLE 19

If a claimant has not brought an action to enforce his claim or if notification of such claim has not been given to the operator within a period of six months from the date of the incident which gave rise to the damage, the claimant shall only be entitled to compensation out of the amount for which the operator remains liable after all claims made within that period have been met in full.

ARTICLE 20

1. Actions under the provisions of this Convention may be brought only before the courts of the Contracting State where the damage occurred. Nevertheless, by agreement between any one or more claimants and any one or more defendants, such claimants may take action before the courts of any other Contracting State, but no such proceedings shall have the effect of prejudicing in any way the rights of persons who bring actions in the state where the damage occurred. The parties may also agree to submit disputes to arbitration in any Contracting State.

2. Each Contracting State shall take all necessary measures to ensure that the defendant and all other parties interested are notified of any proceedings concerning them and have a fair and adequate opportunity to defend their interests.

3. Each Contracting State shall so far as possible ensure that all actions arising from a single incident and brought in accordance with paragraph 1 of this article are consolidated for disposal in a single proceeding before the same court.

4. Where any final judgment, including a judgment by default, is pronounced by a court competent in conformity with this Convention and which execution can be issued according to the procedural law of that court, the judgment shall be enforceable upon compliance with the formalities prescribed by the laws of the Contracting State, or of any territory, state or province thereof, where execution is applied for:

(a) in the Contracting State where the judgment debtor has his residence or principal place of business or,

(b) if the assets available in that state and in the state where the judgment was pronounced are insufficient to satisfy the judgment, in any other Contracting State where the judgment debtor has assets.

5. Notwithstanding the provisions of paragraph 4 of this article, the court to which application is made for execution may refuse to issue execution if it is proved that any of the following circumstances exist:

(a) the judgment was given by default and the defendant did not acquire knowledge of the proceedings in sufficient time to act upon it;

(b) the defendant was not given a fair and adequate opportunity to defend his interests;

(c) the judgment is in respect of a cause of action which had already, as between the same parties, formed the subject of a judgment or an arbitral award which, under the law of the state where execution is sought, is recognized as final and conclusive;

(d) the judgment has been obtained by fraud of any of the parties;

(e) the right to enforce the judgment is not vested in the person by whom the application for execution is made.

6. The merits of the case may not be reopened in proceedings for execution under paragraph 4 of this article.

7. The court to which application for execution is made may also refuse to issue execution if the judgment concerned is contrary to the public policy of the state in which execution is requested.

8. If in proceedings brought according to paragraph 4 of this article, execution of any judgment is refused on any of the grounds referred to in subparagraphs (a), (b) or (d) of paragraph 5 or paragraph 7 of this article, the claimant shall be entitled to bring a new action before the court of the state where execution has been refused. The judgment rendered in such new action may not result in the total compensation awarded exceeding the limits applicable under the provisions of this Convention. In such

new action the previous judgment shall be a defence only to the extent to which it has been satisfied. The previous judgment shall cease to be enforceable as soon as the new action has been started.

The right to bring a new action under this paragraph shall, notwithstanding the provisions of Article 21, be subject to a period of limitation of one year from the date on which the claimant has received notification of the refusal to execute the judgment.

9. Notwithstanding the provisions of paragraph 4 of this article, the court to which application for execution is made shall refuse execution of any judgment rendered by a court of a state other than that in which the damage occurred until all the judgments rendered in that state have been satisfied.

The court applied to shall also refuse to issue execution until final judgment has been given on all actions filed in the state where the damage occurred by those persons who have complied with the time limit referred to in Article 19, if the judgment debtor proves that the total amount of compensation which might be awarded by such judgments might exceed the applicable limit of liability under the provisions of this Convention.

Similarly such court shall not grant execution when, in the case of actions brought in the state where the damage occurred by those persons who have complied with the time limit referred to in Article 19, the aggregate of the judgments exceeds the applicable limit of liability, until such judgments have been reduced in accordance with Article 14.

10. Where a judgment is rendered enforceable under this article, payment of costs recoverable under the judgment shall also be enforceable. Nevertheless the court applied to for execution may, on the application of the judgment debtor, limit the amount of such costs to a sum equal to ten *per centum* of the amount for which the judgment is rendered enforceable. The limits of liability prescribed by this Convention shall be exclusive of costs.

11. Interest not exceeding four *per centum* per annum may be allowed on the judgment debt from the date of the judgment in respect of which execution is granted.

12. An application for execution of a judgment to which paragraph 4 of this article applies must be made within five years from the date when such judgment became final.

ARTICLE 21

1. Actions under this Convention shall be subject to a period of limitation of two years from the date of the incident which caused the damage.

2. The grounds for suspension or interruption of the period referred to in paragraph 1 of this article shall be determined by the law of the court trying the action; but in any case the right to institute an action shall be extinguished on the expiration of three years from the date of the incident which caused the damage.

ARTICLE 22

In the event of the death of the person liable, an action in respect of liability under the provisions of this Convention shall lie against those legally responsible for his obligations.

CHAPTER V

APPLICATION OF THE CONVENTION AND GENERAL PROVISIONS

ARTICLE 23

1. This Convention applies to damage contemplated in Article 1 occurring on the territory of a Contracting State by an aircraft registered in the territory of another Contracting State.

2. For the purpose of this Convention a ship or aircraft on the high seas shall be regarded as part of the territory of the state in which it is registered.

ARTICLE 24

This Convention shall not apply to damage caused to an aircraft in flight, or to persons or goods on board such aircraft.

ARTICLE 25

This Convention shall not apply to damage on the surface if liability for such damage is regulated either by a contract between the person who suffers such damage and the operator or the person entitled to use the aircraft at the time the damage occurred, or by the law relating to workmen's compensation applicable to a contract of employment between such persons.

ARTICLE 26

This Convention shall not apply to damage caused by military, customs or police aircraft.

ARTICLE 27

Contracting States will, as far as possible, facilitate payment of compensation under the provisions of this Convention in the currency of the state where the damage occurred.

ARTICLE 28

If legislative measures are necessary in any Contracting State to give effect to this Convention, the Secretary General of the International Civil Aviation Organization shall be informed forthwith of the measures so taken.

ARTICLE 29

As between Contracting States which have also ratified the International Convention for the Unification of Certain Rules relating to Damage caused by Aircraft to Third Parties on the Surface opened for signature at Rome

on the 29 May 1933, the present Convention upon its entry into force shall supersede the said Convention of Rome.

ARTICLE 30

For the purposes of this Convention:

“Person” means any natural or legal person, including a state.

“Contracting State” means any state which has ratified or adhered to this Convention and whose denunciation thereof has not become effective.

“Territory of a state” means the metropolitan territory of a state and all territories for the foreign relations of which that state is responsible, subject to the provisions of Article 36.

CHAPTER VI

FINAL PROVISIONS

ARTICLE 31

This Convention shall remain open for signature on behalf of any state until it comes into force in accordance with the provisions of Article 33.

ARTICLE 32

1. This Convention shall be subject to ratification by the signatory states.
2. The instruments of ratification shall be deposited with the International Civil Aviation Organization.

ARTICLE 33

1. As soon as five of the signatory states have deposited their instruments of ratification of this Convention, it shall come into force between them on the ninetieth day after the date of the deposit of the fifth instrument of ratification. It shall come into force, for each state which deposits its instrument of ratification after that date, on the ninetieth day after the deposit of its instrument of ratification.

2. As soon as this Convention comes into force, it shall be registered with the United Nations by the Secretary General of the International Civil Aviation Organization.

ARTICLE 34

1. This Convention shall, after it has come into force, be open for adherence by any non-signatory state.

2. The adherence of a state shall be effected by the deposit of an instrument of adherence with the International Civil Aviation Organization and shall take effect as from the ninetieth day after the date of the deposit.

ARTICLE 35

1. Any Contracting State may denounce this Convention by notification of denunciation to the International Civil Aviation Organization.

2. Denunciation shall take effect six months after the date of receipt by the International Civil Aviation Organization of the notification of denunciation; nevertheless, in respect of damage contemplated in Article 1 arising from an incident which occurred before the expiration of the six months period, the Convention shall continue to apply as if the denunciation had not been made.

ARTICLE 36

1. This Convention shall apply to all territories for the foreign relations of which a Contracting State is responsible, with the exception of territories in respect of which a declaration has been made in accordance with paragraph 2 of this article or paragraph 3 of Article 37.

2. Any state may at the time of deposit of its instrument of ratification or adherence, declare that its acceptance of this Convention does not apply to any one or more of the territories for the foreign relations of which such state is responsible.

3. Any Contracting State may subsequently, by notification to the International Civil Aviation Organization, extend the application of this Convention to any or all of the territories regarding which it has made a declaration in accordance with paragraph 2 of this article or paragraph 3 of Article 37. The notification shall take effect as from the ninetieth day after its receipt by the Organization.

4. Any Contracting State may denounce this Convention, in accordance with the provisions of Article 35, separately for any or all of the territories for the foreign relations of which such state is responsible.

ARTICLE 37

1. When the whole or part of the territory of a Contracting State is transferred to a non-contracting state, this Convention shall cease to apply to the territory so transferred, as from the date of the transfer.

2. When part of the territory of a Contracting State becomes an independent state responsible for its own foreign relations, this Convention shall cease to apply to the territory which becomes an independent state, as from the date on which it becomes independent.

3. When the whole or part of the territory of another state is transferred to a Contracting State, the Convention shall apply to the territory so transferred as from the date of the transfer; provided that, if the territory transferred does not become part of the metropolitan territory of the Contracting State concerned, that Contracting State may, before or at the time of the transfer, declare by notification to the International Civil Aviation Organization that the Convention shall not apply to the territory transferred unless a notification is made under paragraph 3 of Article 36.

ARTICLE 38

The Secretary General of the International Civil Aviation Organization shall give notice to all signatory and adhering states and to all states member of the Organization or of the United Nations:

(a) of the deposit of any instrument of ratification or adherence and the date thereof, within thirty days from the date of the deposit, and

(b) of the receipt of any denunciation or of any declaration or notification made under Article 36 or 37 and the date thereof, within thirty days from the date of the receipt.

The Secretary General of the Organization shall also notify these states of the date on which the Convention comes into force in accordance with paragraph 1 of Article 33.

ARTICLE 39

No reservations may be made to this Convention.

IN WITNESS WHEREOF the undersigned Plenipotentiaries, having been duly authorised, have signed this Convention.

DONE at Rome on the seventh day of the month of October of the year One Thousand Nine Hundred and Fifty Two in the English, French and Spanish languages, each text being of equal authenticity.

This Convention shall be deposited with the International Civil Aviation Organization where, in accordance with Article 31, it shall remain open for signature, and the Secretary General of the Organization shall send certified copies thereof to all signatory and adhering states and to all states members of the Organization or the United Nations.

[Here follow signatures on behalf of Argentina, Belgium, Brazil, Denmark, Egypt, Spain, France, Israel, Italy, Liberia, Luxembourg, Mexico, The Netherlands, Portugal, Philippine Republic, Switzerland, and Thailand. The convention was subsequently signed on behalf of Australia, Canada, Ceylon, Dominican Republic, Greece, India, Libya, Norway, Pakistan, Sweden and the United Kingdom.]

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THE GENEVA CONFERENCE ON THE LAW OF THE SEA: WHAT WAS ACCOMPLISHED *

BY ARTHUR H. DEAN

Chairman of the United States Delegation

The General Assembly of the United Nations, by its Resolution 1105 (XI) adopted on February 21, 1957, called for a conference of its members to "examine the law of the sea, taking account not only of the legal but also of the technical, biological, economic and political aspects of the program, and to embody the results of its work in one or more international conventions or such other instruments as it may deem appropriate."¹

The Geneva Conference on the Law of the Sea was convened on February 24, 1958, and finally adjourned on April 28, 1958.

Four conventions emerged from the Conference after much discussion, debate and toil, and are now subject to ratification.² These conventions encompassed a surprisingly large area of agreement.

* The author wishes to express his grateful appreciation for the untiring efforts and able assistance rendered to him as Chairman of the United States Delegation by Mr. Loftus E. Becker, Legal Adviser of the Department of State; Mr. William Sanders, Special Assistant to the Under Secretary of State, Vice Chairman of the United States Delegation; Mr. David H. Popper, United States Deputy Representative to the international organizations in Geneva; Mr. Raymund T. Yingling, Assistant Legal Adviser of the Department of State, Committee I on the Territorial Sea and Contiguous Zone; Vice Admiral Oswald S. Colclough, Department of the Navy, Committee II on the General Regime of the High Seas; Mr. William C. Herrington, Special Assistant to the Under Secretary of State, Committee III on Fishing and Conservation of the Living Resources of the High Seas; Miss Marjorie M. Whiteman, Assistant Legal Adviser of the Department of State, Committee IV on the Continental Shelf; Mr. Nat B. King, Counselor of Embassy for Economic Affairs, Baghdad, Iraq, Committee V on Land-locked Countries; and Mr. Arnie J. Suomela, Commissioner of Fish and Wild Life, Department of Interior.

¹ U.N. General Assembly, 11th Sess., Official Records, Supp. No. 17 (A/3572). The states in attendance at the Conference were: Afghanistan, Albania, Argentina, Australia, Austria, Belgium, Bolivia, Brazil, Bulgaria, Burma, Byelo-Russian S.S.R., Cambodia, Canada, Ceylon, Chile, China, Colombia, Costa Rica, Cuba, Czechoslovakia, Denmark, Dominican Republic, Ecuador, El Salvador, Finland, France, Germany, Ghana, Greece, Guatemala, Haiti, Holy See, Honduras, Hungary, Iceland, India, Indonesia, Iran, Iraq, Ireland, Israel, Italy, Japan, Jordan, Republic of Korea, Laos, Lebanon, Libya, Liberia, Luxembourg, Federation of Malaya, Mexico, Monaco, Morocco, Nepal, Netherlands, New Zealand, Nicaragua, Norway, Pakistan, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Rumania, San Marino, Saudi Arabia, Spain, Sweden, Switzerland, Thailand, Tunisia, Turkey, Ukrainian S.S.R., Union of South Africa, Union of Soviet Socialist Republics, United Arab Republic, United Kingdom, United States, Uruguay, Venezuela, Republic of Viet-Nam, Yemen, Yugoslavia.

² Convention on the Territorial Sea and the Contiguous Zone (U.N. Doc. A/Conf. 13/L.52); Convention on the High Seas (U.N. Doc. A/Conf. 13/L.53); Convention on

The Geneva Conference had the benefit of six sessions of prior work by the International Law Commission. The final report of that Commission, produced in its eighth session, set forth draft articles, with commentary.³ These articles served as the working papers of the Conference, except as to the question of landlocked countries, placed on the agenda at the last minute by the General Assembly.

It is not intended, in this article, to examine each and every provision adopted at the Conference, nor to state in detail the legal position of each subject as it stood before the Conference. Rather it is attempted here to present some indication of the legal problems which faced the Conference, the nature of the controversies which arose within the Conference, and the range of agreement and settlement which emerged from it.

In the eyes of the world, and particularly in the somewhat meager press coverage in the United States, the major problem facing the Conference appeared to be the determination of the legal limit of the territorial sea appertaining to a coastal state. The rest of the work was largely ignored in the press. It is true that the Conference was not able to resolve this inordinately difficult and controversial question. But this should not obscure the fact that, although several proposals as to the breadth of the territorial sea which would have been detrimental to the free world were advanced, none was adopted. Nor should it dim the success which the Conference achieved on other topics, some of which were equally involved and charged with political connotations.

President Eisenhower and Secretary of State Dulles, as well as the author as Chairman of the United States Delegation, knew before we entered the Conference that it would be an exceptionally difficult one for many reasons.

The U.S.S.R. bloc was insisting, for military reasons, on a twelve-mile or greater territorial sea, a breadth which, of course, had not been recognized in international law.⁴ The attitude of some of the Arab League countries toward the problems of the law of the sea was colored by the

Fishing and Conservation of the Living Resources of the High Seas (U.N. Doc. A/Conf. 13/L. 54); and Convention on the Continental Shelf (U.N. Doc. A/Conf. 13/L. 55).

In addition, an Optional Protocol of Signature concerning the Compulsory Settlement of Disputes (U.N. Doc. A/Conf. 13/L.57) emerged from the Conference. The Protocol provides that disputes between parties to the Protocol and to any one or more of the Conventions on the Law of the Sea arising out of the interpretation or application of any such Convention, except certain provisions of the Convention on Fishing and Conservation of Living Resources of the High Seas, shall lie within the compulsory jurisdiction of the International Court of Justice. For texts of the Conventions and Protocol see below, p. 834 *et seq.*

The four Conventions remained open for signature until Oct. 31, 1958, under the auspices of the United Nations, after which they may still be acceded to by any nation. At the present date, each of these four Conventions has been signed by at least 35 nations including the United States and the United Kingdom. They will go into effect after 22 ratifications.

³ International Law Commission, Report, U. N. General Assembly, 11th Sess., Official Records, Supp. No. 9 (A/3159); 51 A.J.I.L. 154 (1957).

⁴ See, for example, Brierly, *The Law of Nations* 176-178 (5th ed., 1955).

problem of Israel's rights of passage through straits connecting international bodies of water in the Gulf of Aqaba. Some of the Arab States (Saudi Arabia and United Arab Republic) had announced unilaterally their assumption of a twelve-mile territorial sea just after the Conference convened.⁵

Several newly created states brought to the Conference a body of resentment toward those to whom they formerly were in a colonial position or at least a wish to exercise their sovereignty and make their own decisions with respect to the rights of older nations to fish off their coasts. The exceptionally difficult economic situation in many Latin American countries, caused in part by the fall-off in exports of coffee (due to the increase in the production of African coffee), wool, cotton, sugar, tuna, shrimp, lead, zinc and copper, imposed on these countries a variety of needs conflicting with our own. The United States had recently placed restrictions upon the importation of oil which affected both Venezuela and Canada.

Chile, Ecuador and Peru had claimed 200 miles of territorial sea, or of exclusive jurisdiction, vitally affecting our tuna fleets' operation in those waters, while Argentina had claimed sovereignty over the epicontinental sea (the water above the continental shelf), which would extend for hundreds of miles in many areas of the Atlantic coast.⁶ Mexico had claimed nine miles, striking at our shrimp fleets' right to operate in parts of the Gulf of Mexico.⁷ Canada claimed the right to regulate fishing for twelve miles off its coast,⁸ despite the claimed historical rights and practices of other nations fishing off the Canadian coast, and had sponsored a proposal which, while retaining the three-mile territorial sea, would grant exclusive fishing rights for twelve miles to the coastal state.

This variety of conflicting claims and purposes insured a stormy passage at the conference table for the United States. Not only were we to meet the usual Soviet tactics of delay, deceit and detour accompanying a bland disregard of facts, but also expressions of pious altruism for the problems of the newly created states as against the "sinister" motives of the maritime Powers. We were also to be faced, on some matters, with the opposition

⁵ N. Y. Times, March 14, 1958, p. 50, col. 7; N. Y. Times, March 20, 1958, p. 58, col. 4.

⁶ Declaration on Maritime Zones signed at Santiago, Chile, Aug. 18, 1952, by Peru, Chile and Ecuador and subsequently by Costa Rica.

Argentine Decree No. 14,708 (Oct. 11, 1946). The Argentina Decree of 1946 includes a statement that free navigation on the epicontinental sea would not be affected, so that the net effect appears to be a claim to an exclusive fisheries contiguous zone.

In 1956 the representatives of Peru, Ecuador, Chile and Costa Rica explained to the United Nations that their respective governments had merely intended to proclaim fishing and conservation authority and had not intended to extend territorial waters to 200 miles. U.N. Docs. A/C.6/SR.486 at 28, 29 (1956), A/C.6/SR.489 at 43, 45 (1956), A/C.6/SR.496 at 84, 86 (1956), A/C.6/SR.498 at 97 (1956).

⁷ See U. S. Naval War College, International Law Situation and Documents, 1956, pp. 479-480.

⁸ Canadian Comments on the International Law Commission's final Report on the Law of the Sea, letter of Sept. 10, 1957, U.N. Doc. A/Conf. 13/5 at 5, 6-7 (1957); U. S. Naval War College, *op. cit.* 447-448.

of nations such as some of our good friends in Latin America and Canada who were normally on our side in international negotiations.

I. THE TERRITORIAL SEA

(A) *What was at stake?*

The United States, together with Great Britain, Japan, Holland, Belgium, Greece, France, West Germany, and other maritime nations, adopted as its first goal in the Conference the preservation of the traditional limit of the territorial sea at three miles except as modified by reasonably greater historical limits. It did so, not simply because that limit has long been recognized in international law, but for compelling military and commercial reasons.

The territorial sea is the belt of water running along the coast over which the coastal state exercises sovereignty, subject to certain limitations imposed by international law. Any extension of the width of the nation's territorial sea or of its internal waters cuts down the freedom of all other nations to sail on, fly over, or lay cables in, what was formerly the high seas.⁹ There is no right for aircraft to overfly another nation's territorial sea except under a treaty, with its consent, or pursuant to the Chicago Civil Aviation Convention of 1944¹⁰ as to the contracting parties thereto.

An extension of the territorial sea threatens the security of the United States by reducing the efficiency of its naval and air power, and by subjecting it to increased risk of surprise attack. What rules of international law prevail in time of war is unfortunately often a question of expediency. Neutral nations, however, even in time of war, do insist on the observance of the rules of law previously adopted. And a nation such as ours, with a decent regard for the opinions of mankind, cannot lightly envision the disregard of international law in the territorial waters of neutral nations. We must assume, in appraising the effect of the adoption of any rule, that we would respect that rule, as to neutral nations, even in time of war.

An extension of the territorial sea of neutral nations would dramatically increase the striking power of enemy submarines. Submarines normally operate with considerable difficulty and with much risk under water within three miles from shore but their freedom of movement is greatly increased between three and twelve miles. If the territorial sea were extended to twelve miles, an enemy submarine, particularly one with atomic power which might operate for long periods without surfacing,

⁹ Art. 2, Convention on the High Seas (U.N. Doc. A/Conf. 13/L.53).

In spite of the right of innocent passage accorded foreign vessels, a state has large freedom in imposing regulations, which the foreign vessel is obliged to respect, designed to promote traffic safety, sanitation, conservation and the public policy and fiscal interests of the state. 1 Hyde, *International Law* 518 (2d ed., 1945). Art. 17 of the Convention on the Territorial Sea and the Contiguous Zone (U.N. Doc. A/Conf. 13/L.52) specifically provides that foreign ships exercising the right of innocent passage "shall comply with the laws and regulations enacted by the coastal State in conformity with these articles and other rules of international law. . . ."

¹⁰ Convention on International Civil Aviation of Dec. 7, 1944, in force April 4, 1947, T.I.A.S., No. 1591.

could operate possibly undetected under waters in a neutral state's territorial sea.¹¹ But our surface ships could not operate on the surface of these waters within the territorial sea without risking charges of violating such state's neutrality. An extension of the territorial sea to twelve miles might thus make an enemy fleet of submarines, capable of discharging missiles from near the coast, practically inviolable while operating under water in the territorial seas of neutral nations.

Of course any such increase in the effectiveness of underwater power is to the benefit of the Soviet Union, which today has some 475 submarines, many of them long-range types. It is believed that the Soviet Union is shifting to nuclear-powered and missile-carrying submarines.¹² Nor would the loss to the freedom of commercial shipping, resulting from an increase in a coastal state's territorial sea, be of especial concern to her, for the U.S.S.R. is from an operational standpoint essentially a landlocked country. It is a Communist country which, together with its satellites, is largely self-sufficient in time of peace, and is not as significantly engaged in trade or shipping with other nations as is the free world. At the end of June 30, 1957, the U.S.S.R. ranked twelfth as a surface maritime merchant shipping Power, but first as an underwater Power equipped with submarines of great destructive ability.¹³

Clearly, the advance in striking power and in underwater range of the new submarines raises extraordinary complications as to the appropriate breadth for a territorial sea. The United States was, in the interest of the free world, concerned to keep the territorial sea within as narrow limits as possible.

The military risk of such an extension of the breadth of the territorial sea is not confined to the submarine problem. The extension of territorial waters from a coastal state and from the islands belonging to such state from three to twelve miles in the Mediterranean Sea alone, and particularly in the Aegean Sea, would materially reduce the area of the high seas on which our fleets could operate. Such an extension of the territorial sea might for navigational purposes change the Aegean Sea into a series of unconnected lakes of high seas.¹⁴ Our Sixth Fleet might

¹¹ Par. 6 of Art. 14 of the Convention on the Territorial Sea and Contiguous Zone (*loc. cit.* at 6) requires submarines when navigating in a territorial sea to stay on the surface and to show their flag. A similar rule was contained in the articles provisionally approved by the 1930 Hague Conference for the Codification of International Law. See Annex to the Final Act of the Hague Conference for the Codification of International Law, 1930 (League of Nations Doc. 1930. V. 7, p. 15).

However, it is not realistic to assume that belligerent submarines will obey the law in time of war at the risk of detection and of charges of violating a neutral's territorial sea.

¹² Jane's Fighting Ships 1957-58, p. 332; Hanson W. Baldwin, *The Great Arms Race* 25 (1958).

¹³ Britannica Book of the Year 1958, p. 432; Jane's Fighting Ships.

¹⁴ Some of the other areas where such an extension would materially reduce the high seas are the Baltic Sea, the Bay of Bengal, the seas around Indonesia and the Philippine Islands and from the Philippine Islands to Japan, the Yellow Sea, the Bering Sea and the Caribbean Sea. The Gulf of Bothnia, the Gulf of Chihli (Pohai) and the

not then be able to continue to operate there and its ability to maneuver would be greatly decreased; our aircraft might not be able to overfly newly created territorial seas. Without such rights, the recent landing of United States Forces in Lebanon might not have been legally possible, and the presence and movements of the United States Seventh Fleet and its aircraft in the defense of the Nationalist Chinese islands of Quemoy and Matsu would have been seriously impeded.¹⁵ The Chinese Communist claims to a territorial sea of twelve miles, not only as to their own mainland coast but also as to Nationalist Chinese Penghu and Taiwan, have been rejected by the United States, which continues to recognize the three-mile limit.

While surface ships have a right of innocent passage in straits connecting parts of the high seas, even though the straits are entirely territorial seas, this right does not, in the absence of treaty, extend to aircraft's right to overfly.

The operation of commercial shipping on, or commercial aircraft over, water would also be greatly handicapped, slowed down and subjected to interminable delays. Indeed, it would seem to have been part of the Russian purpose in backing extensions of the territorial sea so to hamper the commerce of the free world as a part of its sand-in-the-gear-box technique. Extensions of the territorial sea might require new treaties or agreements with each coastal state through whose territorial waters the commercial states' ships would then pass. The right and ability of merchant ships carrying goods and passengers to schedule the most economical passage possible between ports, to enter and leave harbors freely, and to move on the surface of the water without interruption or delay would be jeopardized.

Gulf of Paria, and possibly the Baltic Sea, would be cut off from the high seas by territorial waters. Disconnected lakes might exist in the seas around Indonesia and the Philippine Islands. The Straits of Gibraltar, the Large Strait at the mouth of the Red Sea, the Malacca and Singapore Straits, the Torres Strait, Tsugaru Strait and the Bering Strait would become territorial waters.

If the Philippine and Indonesian claims (See Evensen, *Certain Legal Aspects Concerning the Delimitation of the Territorial Waters of Archipelagoes* 27 (U.N. Doc. A/Conf. 13/18), and N.Y. Times, Jan. 18, 1958, p. 3, col. 1) that the waters "around, between and connecting" the islands of an archipelago should be treated as internal waters and the surrounding areas, determined from straight base lines, treated as territorial waters were accepted, the whole of the South Eastern Pacific would be removed from the high seas as would other areas such as the waters surrounding the Federation of the West Indies in the Caribbean.

The harmful effects of any such extension on sea navigation would be great and the effects on air navigation might be catastrophic.

¹⁵ N. Y. Times, July 16, 1958, p. 1, col. 8.

The announcement of Communist China, N. Y. Times, Sept. 5, 1958, p. 1, col. 6, p. 3, col. 2, made clear that flights over the extended territorial sea would not be permitted. Furthermore, the sea would be measured from straight baselines instead of from the contour of the coastline.

The routes and practices of freight and passenger aircraft would similarly be subject to disruption.¹⁶ Finally, with the increased speed of aircraft, the widening of an individual coastal state's territorial sea would increase the possibilities of international disputes caused by the unintentional violation of a nation's territory by unauthorized aerial overflight. Our recent experience, in which an unarmed American plane over Soviet Armenia was shot down and its crewmen captured, is an unfortunate example.¹⁷

(B) *What was accomplished?*

The most recent world conference on the law of the sea before the Geneva Conference was held at The Hague in 1930. There the question of the proper breadth of the territorial sea was debated so vigorously, and with so little concurrence of opinion, that no single resolution proposing an appropriate breadth was even put to a vote.¹⁸ Since that time, the area of agreement has been further diminished by new claims to large areas of the high seas and by such political problems as that of the Gulf of Aqaba. The problem was discussed at several meetings of the International Law Commission in preparation for the Conference. Figures for the breadth of the territorial sea ranging from three miles to several hundred miles were suggested but none were adopted.

Some members of the Commission suggested a rule that each nation was free to fix its own territorial sea in accordance with the "real needs" of that state; that where the breadth adopted could be shown justified by such "needs" the limit would be in accordance with international law. Another party urged that the Commission adopt a rule that any limit between three and twelve miles was to be considered legal. Yet another opinion would have allowed a state to fix a breadth greater than three miles, but not to enforce it against any state which had not adopted an equal or greater breadth.¹⁹

The Commission was unable to agree on any of these proposals, or on any other. It contented itself with drafting, in its final report, the following provision:

¹⁶ In the Convention on International Civil Aviation (T.I.A.S., No. 1591) and the related agreements, the territory of a state is deemed to be the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate of such state.

Although it can be argued that territorial waters as used therein means the territorial waters as they then existed or as they may thereafter exist, it is also arguable that the term would not include any extension of territorial waters, e.g., an extension from three miles to twelve miles.

¹⁷ N. Y. Times, June 30, 1958, p. 1.

¹⁸ Jesse S. Reeves, "The Codification of the Law of Territorial Waters," 24 A.J.I.L. 486, 492 (1930).

¹⁹ See commentary to Article 3, Int. Law Commission Report, U. N. General Assembly 11th Sess., Official Records, Supp. No. 9, at 12 (A/3159).

ARTICLE 3

1. The Commission recognizes that international practice is not uniform as regards the delimitation of the territorial sea.

2. The Commission considers that international law does not permit an extension of the territorial sea beyond twelve miles.

3. The Commission, without taking any decision as to the breadth of the territorial sea up to that limit, notes, on the one hand that many states have fixed a breadth greater than three miles and, on the other hand, that many states do not recognize such a breadth when that of their own territorial sea is less.

4. The Commission considers that the breadth of the territorial sea should be fixed by an international conference.²⁰

In other words, the Commission adopted no provision which would alter the traditional rule that the maximum breadth of the territorial sea is three miles. While it did not suggest any particular extension of that breadth, it did commit itself to the proposition that, without prejudice as to the legality of any lesser limit, any claim of more than twelve miles was clearly indefensible.²¹ It did not, however, approve the twelve-mile limit; rather it left the question to the Conference.

It was against this background that the Conference attempted to do what the Commission could not do: arrive at an agreement on a particular limit. The position adopted by the United States was this: Although it believed the three-mile limit firmly established in international law, and although it regarded that limit as a proper compromise between the interests of the coastal states and the principle of freedom of the seas, it was willing to explore other proposals in the hope of achieving agreement.

To this end, after discussion had shown no hope of the necessary two-thirds vote required in plenary on either the three-mile limit or any other limit, the United States Delegation offered a compromise proposal: that the territorial sea should be extended to six miles, with the right of the coastal state to regulate fishing for another six miles subject to certain historical fishing rights.

Our Delegation believed that this proposal accommodated the sincere interests of all states represented. Since each state controls fishing rights in its own territorial sea,²² the economic interests of states dependent upon their fishing industries would have been served by allowing them a twelve-mile zone for fishing. At the same time it would have preserved six miles of that twelve-mile zone as high seas, and thus, to that extent, defeated those who sought to extend the territorial sea to twelve miles for military as distinct from economic purposes.

In plenary session the American proposal received the largest number of votes in favor of any proposal, 45 to 33, including, with the exception of Iceland, all of the votes of the NATO nations, the active help of Greece,

²⁰ Int. Law Commission Report, *ibid.* at 4; 51 A.J.I.L. 161 (1957).

²¹ Speech of Mr. François, *Rapporteur* of the International Law Commission, to the 485th meeting of the Sixth Committee of the General Assembly, Nov. 28, 1956, U.N. Doc. A/Conf. 13/19 at 9-10 (1956).

²² Convention on the Territorial Sea and Contiguous Zone, Art. 1.

Italy, Spain, Pakistan, South Vietnam and Turkey, and all of the Commonwealth countries (with the exception of Canada), including Great Britain, Australia, New Zealand, India, Ceylon, Malaya and Ghana, and even Middle Eastern countries such as Iran and Lebanon.²³

Although the proposal failed to receive the necessary two-thirds (52 of those present and voting), many a delegate from countries other than those from the Soviet bloc and from the Arab countries with coasts on the Gulf of Aqaba, praised the United States for its creative imagination and good will in making the proposal despite the economic detriment to its fishing interests, and for the sincere efforts of the United States Delegation to make the Conference a success. Indeed, the Holy See, terming the United States proposal a creative and moral one, voted for it even though it abstained on every other proposal as to the breadth of the territorial sea.²⁴

The failure to receive a two-thirds vote on the breadth of the territorial sea must not be interpreted as anti-United States. Certain states in Latin America, in Central America and Burma, among others, have constitutional or statutory provisions fixing the territorial sea to an extent beyond three miles, and other states, such as Colombia and Venezuela, have a border dispute based on old maps, so each claims twelve miles.

Some states, for example, Argentina and Korea, regarded the arbitration procedures in the United States proposal as contrary to sovereignty and in effect voted against them.

Regardless of the action taken by the Conference, Iceland indicated her intention to protect her fisheries by unilaterally announcing on June 30, 1958, shortly after the Conference closed, that, effective September 1, 1958, her fishing limits would be extended to twelve miles.²⁵ Panama did not wish to yield her alleged rights to claim that the Bay of Panama is an historic water which can be legally excluded from the high seas.²⁶ Others, such as Burma, wished to claim twelve miles in order to exclude Japanese fishermen from her territorial waters. The Philippines and Indonesia voted "no" in order to preserve their claims to the waters surrounding and in between the islands in an archipelago.²⁷ Canada had a general election while the Conference was in progress and took into account Canadian fishermen's desire to exclude foreign fishermen from the right to fish within twelve miles of her shores, a result that would have been profoundly detrimental to our cod, halibut and salmon fisheries.

²³ U.N. Doc. A/Conf. 13/SR.14 at 12-15. ²⁴ *Ibid.* 16.

²⁵ In response to this declaration fishing-vessel owners from Britain, Denmark, Holland, Belgium, France, Spain and West Germany met in Holland and announced that they would continue to fish within the new twelve-mile limit, but outside the old four-mile limit, and asked their respective governments for help. The British Government announced that armed escorts would protect British trawlers if necessary. N. Y. Times, July 21, 1958, p. 12, col. 6.

After the breakdown of NATO attempts to solve the dispute, a fleet of British trawlers sailed for Icelandic fishing waters convoyed by British frigates. Attempts by Iceland's coast guard to arrest trawlers within the claimed twelve miles were beaten off with physical violence. N. Y. times, Sept. 3, 1958, p. 1, col. 6.

²⁶ Law No. 9 of the Republic of Panama (Jan. 30, 1956).

²⁷ For discussion of these claims and their implications see note 14 above.

Others, such as Afghanistan and Nepal, territorially located near borders of the Soviet Union or its satellites, abstained for policy reasons, as did certain Arab states whose Arab neighbors voted "no." Chile abstained in committee, but voted "no" in plenary, because in the interim our Secretary of the Interior had recommended in a report to the Senate Finance Committee that we restore tariffs on copper.²⁸ Tunisia and Morocco voted "no" in order to exclude France from exercising fishing rights within nine miles of their coasts.

Thus the inference that defeat of the American proposal is an indication of a general decrease in American authority or in international respect for American positions is unwarranted. It is equally unwarranted to assume that the traditional three-mile limit of the territorial sea is no longer international law. All efforts to agree on a new figure failed. The fact that a two-thirds vote could not be obtained in favor of the three-mile limit shows merely a desire on the part of many nations to extend their territorial sea, not that such an extension in international law has been accomplished.

II. STRAIGHT BASELINES

One of the most complex and controversial problems which the Conference faced was the claim of many nations that the baseline from which the territorial sea is measured need not be the actual coastline of the state involved but may, under certain circumstances, be a system of straight lines drawn from points on or near the shore over portions of water to other points on or near the shore. The law governing the establishment of such baselines was set forth by the International Court of Justice in the well-known *Fisheries Case*.²⁹ Norway had seized English fishing boats operating in waters off the coast of Northern Norway, which Norway claimed to be within her territorial sea. Since the waters involved were more than four miles (Norway's territorial sea claim) from land at some points, England argued that the waters must constitute part of the high seas.

The Court in an extended and elaborate opinion sanctioned the Norwegian practice of drawing a baseline which failed to follow the "sinuosities" of the extraordinarily indented Norwegian coast, but which followed the general direction of that coast. The chief concern of the Court was to state the geographical circumstances under which such straight baselines would be permitted. The operative portion of the opinion was this:

Where a coast is deeply indented and cut into, as is that of Eastern Finnmark [Norway's northern coast], or where it is bordered by an archipelago such as the "skjaergaard" along the western sector of the coast here in question, the base-line becomes independent of the low-water mark . . . In such circumstances the line of the low-water mark can no longer be put forward as a rule requiring the coast line to be followed in all its sinuosities; . . .³⁰

²⁸ N. Y. Times, April 12, 1958, p. 31, col. 6.

²⁹ Fisheries Case, [1951] I.C.J. Rep. 116; 46 A.J.I.L. 348 (1952).

³⁰ [1951] I.C.J. Rep. 128-129.

The International Law Commission sought to embody the opinion of the Court in its draft. It did so in substantially the language which was finally adopted by the Conference as Article 4 of the Convention on the Territorial Sea:

ARTICLE 4 ✓

1. In localities where the coast line is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured.

2. The drawing of such baselines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters.

3. Baselines shall not be drawn to and from low-tide elevations, unless lighthouses or similar installations which are permanently above sea level have been built on them.

4. Where the method of straight baselines is applicable under the provisions of paragraph 1, account may be taken, in determining particular baselines, of economic interests peculiar to the region concerned, the reality and the importance of which are clearly evidenced by a long usage.

5. The system of straight baselines may not be applied by a State in such a manner as to cut off from the high seas the territorial sea of another State.

6. The coastal State must clearly indicate straight baselines on charts, to which due publicity must be given.

Both in the Commission and at the Conference several states sought to introduce a maximum length for a single baseline, that is, a maximum length of a line between any two particular points.³¹ The Commission, in its sixth session, had adopted a maximum length of ten miles, but deleted this restriction in its final draft.³²

One of the major controversies at the Conference concerned the geographical conditions necessary to invoke this exceptional method of drawing baselines. Since this method involves making waters into territorial sea which would otherwise be part of the high seas, it was felt that only conditions making it extremely impracticable to draw a baseline along the coast itself should allow an exception to the general rule. The opinion of the Court in the *Fisheries Case* had recited and discussed at great length the peculiarities of the Norwegian coast, along which the Norwegian Government estimated that there were 120,000 islands within a 600-mile stretch,³³ and into which the Norwegian fjords cut deeply.

The draftsmen of the article intended to incorporate the Court's suggestion, that only exceptional circumstances would permit straight baselines, by taking the phrase "Where the coast line is deeply indented and cut into or if there is a fringe of islands along the coast in its immediate

³¹ See commentary to Article 5, Int. Law Commission Report (cited note 3 above) at 14-15.

³² *Ibid.*

³³ *Fisheries Case*, *loc. cit.* 127.

vicinity" from the opinion of the Court itself. Indeed, the United States Delegation thought that this language, when taken out of context, did not limit the circumstances under which straight baselines might be used as sharply as did the Court's opinion as a whole. But since there is ample evidence that the Conference intended to adopt the spirit of the opinion, it is to be assumed that the language of Article 4 will be interpreted restrictively.

On this question the United States was successful in a drafting change which involved a substantial point. In the opinion in the *Fisheries Case*, the Court, after having justified the Norwegian practice of drawing straight baselines because of the Norwegian geography, upheld its right to draw particular baselines in certain areas on economic grounds, for example, so as to include a particular area especially important to Norwegian fishermen within the territorial sea.³⁴

The Soviet bloc attempted to argue that the initial choice of whether or not straight baselines could be used might be made on economic as well as geographical considerations. If they had been successful, a nation with a coast much more regular than the Norwegian might yet have succeeded in running its baseline over water, thus pushing the territorial sea out into the high seas, on the claim that fishing stocks vital to her commonweal would otherwise not be enclosed. But the article as adopted makes clear that economic interests evidenced by long usage can be used only in determining particular baselines, once, on geographic considerations, the method of straight baselines is allowed.

In one respect, the convention adopted runs counter to the opinion of the Court in the *Fisheries Case*. Paragraph 3 of Article 4 reads:

Baselines shall not be drawn to and from low-tide elevations, unless lighthouses or similar installations which are permanently above sea level have been built on them.

The Court had permitted Norway to draw baselines between points on bodies of land above the water only at low tide.³⁵ In rejecting such baselines, the Conference again sought to limit the extent to which straight baselines could be used to extend the nation's territorial sea into the high sea.

As a result of the use of straight baselines, as distinguished from normal baselines, areas of water, which were previously part of the territorial sea or the high seas, may be enclosed between the coast and the baseline. The Court in the *Fisheries Case* stated that these waters were to be considered "internal waters," that is, as much subject to the sovereignty of the coastal state as are internal lakes. The Conference followed the Court in characterizing these waters as internal waters,³⁶ but provided in Article 5 of the Convention on the Territorial Sea that a right of innocent passage identical to that through the territorial sea exists through such newly-created internal waters.³⁷

³⁴ *Ibid.* 133, 142.

³⁵ *Ibid.* 128.

³⁶ See commentary to Article 5, Int. Law Commission Report (cited note 3 above) at 14-15.

³⁷ *Ibid.*, Art 5.

The Conference thus resisted any efforts to expand the rule laid down by the International Court in such a way as to permit states with only slightly irregular coastlines to extend their territorial seas by drawing baselines over water rather than along the coast. This is an illustration of the general spirit of the Conference of respect for the integrity of the high seas and its freedoms.

The United States would have preferred a more detailed exposition of the geographical requisites of straight baselines. Nevertheless, its Delegation believed that Article 5, as reinforced by its attempt to reproduce the opinion of the World Court, is a contribution to clarity on the question.

III. THE CONTINENTAL SHELF

Since the Truman Proclamation of 1945,³⁸ in which the United States asserted control over the resources of the continental shelf of the United States, the subject of a nation's rights to the animal and mineral resources of the seabed contiguous to its shores has been vigorously discussed and debated. Many nations have asserted claims similar to that made by the United States.³⁹ But the Convention on the Continental Shelf adopted at the Geneva Conference represents the first worldwide accord on the subject and is highly satisfactory to the United States.

The Convention grants to the coastal state sovereign rights over its continental shelf for the purpose of exploring it and exploiting its natural resources.⁴⁰

The continental shelf is defined

as referring (a) to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas; (b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands.⁴¹

It does not include the superjacent waters or airspace, nor does it extend the breadth of the territorial sea.⁴²

There had been considerable debate before the International Law Commission, in preparing a draft for the Conference, as to whether the extent of the continental shelf should have been defined exclusively by the depth of the water lying above it, without the saving clause of the exploitability test inserted in the convention as adopted.⁴³ In one draft the Commission adopted the exploitability test with no reference to a specific depth of water; in another it adopted the 200-meter depth test with no exploitability

³⁸ 10 Fed. Reg. 12303; 13 Dept. of State Bulletin 485 (1945); 40 A.J.I.L. Supp. 45 (1946).

³⁹ Lauterpacht, "Sovereignty Over Submarine Areas," 27 Brit. Year Bk. Int. Law 376, 380-382 (1950).

⁴⁰ Convention on the Continental Shelf, Art. 2.

⁴¹ *Ibid.*, Art. 1.

⁴² *Ibid.*, Art. 3

⁴³ See commentary to Article 67, Int. Law Commission Report (cited note 3 above) at 41.

test but, primarily because that test was adopted by the Inter-American Specialized Conference at Ciudad Trujillo in 1956,⁴⁴ the present convention was adopted.

The effect of the present language is that exploitability, and therefore the necessary control, will be presumed to a depth of 200 meters, but must be shown beyond that point. Although the Commission and the Conference showed themselves aware that technical advances may increase the depth to which control is possible, the 200-meter figure (655 feet) serves to represent the greatest depth at which control is now thought to be possible.

It will be noted that Article 2 of the Convention grants to the coastal state "sovereign rights for the purpose of exploring it and exploiting its natural resources." In the Truman Proclamation of 1945 the United States was careful not to claim any "sovereign rights" in the continental shelf, taking the position that, under such decisions as the *Island of Palmas Arbitration*,⁴⁵ there can be no sovereignty without effective occupation and control.⁴⁶ In the language used in Article 2, the United States' main concern was respected, that is, that the grant of sovereignty be only as to the seabed and subsoil, not in the seas and airspace above.

Similarly, the United States was successful in limiting the class of resources to which the exclusive control of the coastal state pertains. There had been considerable disagreement among states as to whether animal life, which is dependent upon the seabed but is not permanently attached to the seabed, belongs exclusively to the coastal state. The United States has been engaged in controversy with Mexico as to whether American fishermen may take shrimp from the seas lying over the Mexican continental shelf.⁴⁷

The Inter-American Council of Jurists, meeting in Mexico City in 1956, approved the following statement:

The rights of the coastal state . . . extend (to) . . . all marine, animal and vegetable species that live in a constant physical and biological relationship with the shelf, not excluding the benthonic species [which include shrimp].⁴⁸

⁴⁴ Final Act, Inter-American Specialized Conference on "Conservation of Natural Resources: The Continental Shelf and Marine Waters," Ciudad Trujillo, March 15-18, 1956, p. 13 (Conference and Organization Series, No. 50, Pan American Union, 1956).

⁴⁵ The *Island of Palmas (Miangas) Arbitration*, 2 Int. Arb. Awards 829 (Perm. Ct. of Arb., 1928); 22 A.J.I.L. 867 (1928).

⁴⁶ The Proclamation stated that the United States regards the natural resources of the continental shelf as "subject to its jurisdiction and control" but further stated that this in no way affects "the character as high seas of the waters above the continental shelf and the right to their free and unimpeded navigation." 13 Dept. of State Bulletin 485 (1945).

⁴⁷ This controversy, which began prior to World War II and which involves questions both of the coastal state's rights in the continental shelf and of the breadth of the territorial sea, has in recent years become more intense. See N. Y. Times, Nov. 14, 1956, p. 31, col. 3, and Nov. 18, 1956, p. 13, col. 1.

⁴⁸ Final Act, Third Meeting of the Inter-American Council of Jurists, Mexico City, January 17-February 4, 1956, Resolution XIII, pp. 36-37; 34 Dept. of State Bulletin 298-299 (1956).

The Inter-American Specialized Conference in Ciudad Trujillo in 1956 could not agree on whether such sea food was included in the coastal states' exclusive rights.⁴⁹

In the commentary to the International Law Commission's draft resolutions on the continental shelf, the Commission stated that attempts to further define the term "natural resources" to make it specifically include such resources permanently attached to the bed of the sea or to make it include all marine life living in constant physical and biological relationship with the seabed were rejected. The Commission did not, therefore, take a stand in its draft as to whether the term "natural resources" would include shrimp and other such crustaceans.⁵⁰ But in a new clause, added and adopted by the Conference, the convention now explicitly excludes from the domain of the coastal state organisms which are able to move other than "in constant physical contact with the sea bed or the subsoil." This definition excludes such crustaceans as shrimp, but it does give coastal states such as Australia the right to control oyster beds and pearl fisheries.

IV. INNOCENT PASSAGE THROUGH INTERNATIONAL STRAITS

The Convention on the Territorial Sea adopted at the Conference contains the following crucial provision as Article 16(4):

There shall be no suspension of the innocent passage of foreign ships through straits which are used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign State.

This highly controversial provision is grounded primarily in the decision of the International Court of Justice in the *Corfu Channel*⁵¹ case. But it goes further than did the decision in that case. It specifically determines the heated controversy between Israel and the Arab states as to the right of Israeli shipping to pass through the Strait of Tiran to the Gulf of Aqaba.⁵²

Discussion of the article requires a brief statement of the *Corfu* decision. The Corfu Strait runs for about 30 miles between the Island of

⁴⁹ Final Act, Inter-American Specialized Conference on "Conservation of Natural Resources: The Continental Shelf and Marine Waters," Ciudad Trujillo, 1956, p. 13 (Conference and Organization Series, No. 50, Pan American Union, 1956).

⁵⁰ See commentary to Article 68, Int. Law Commission Report (cited note 3 above) at 42-43.

⁵¹ *Corfu Channel Case*, [1949] I.C.J. Rep. 4; 43 A.J.I.L. 558 (1949).

⁵² The Gulf of Aqaba is located at the northern end of the Red Sea and lies east of the Gulf of Suez from which it is separated by the Sinai Peninsula. The Strait of Tiran at the mouth of the Gulf is controlled, together with most of the shore, on the west by Egypt and on the east by Saudi Arabia, which owns the Island of Tiran forming the western boundary of the Strait. A small strip, however, including the port of Aqaba, on the northeast end of the Gulf is controlled by Jordan and a similar strip on the northwest end, including the port of Eilat, is controlled by Israel.

The dispute between Israel and the Arab states concerned the question of whether the Strait and the Gulf were international waterways through which shipping to and from the Israeli port of Eilat could pass. See article by Selak below, p. 660.

Corfu and the west coasts of Greece and Albania. At points the strait is less than six miles wide. Both Greece and Albania claimed three-mile territorial seas or, where the width is less than six miles, territorial seas to the midline.

In early 1946 two British cruisers were fired upon by Albanian shore batteries while in the Strait. In response to Albanian charges that foreign warships required prior consent to enter Albanian waters in the Strait, Britain, without such authorization, then sent a fleet of ships down the Channel with guns at the ready. Two of the warships struck mines, presumably laid by Albania at a point in the Strait within Albanian waters. Great Britain sued Albania for damages in the World Court. The Court stated the law thus:

It is, in the opinion of the Court, generally recognized and in accordance with international custom that States in time of peace have a right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorization of a coastal State, provided that the passage is *innocent*. . . .⁵³

The International Law Commission, in its several annual meetings, attempted to draft a provision to be adopted by the Conference which would as nearly as possible incorporate the Court's decision.⁵⁴ Most of the debate centered about two points: (1) Does the duty not to suspend the right of innocent passage obtain in all straits connecting parts of the high seas, or just in straits especially important to commerce or navigation? (2) Did the Court's holding, specifically, apply to the Israel-Arab controversy as to the Gulf of Aqaba?

The opinion of the Court in the *Corfu* case contained statistics as to the amount of traffic in the Corfu Strait; it cited the "geographical situation [of the Strait] as connecting two parts of the high seas and the fact of its being used for international navigation";⁵⁵ it mentioned the Strait's "special importance to Greece by reason of the traffic to and from the port of Corfu";⁵⁶ and concluded that it "has nevertheless been a useful route for international maritime traffic. . . ."⁵⁷ All of this lent support to the argument that the doctrine of the *Corfu* case was dependent upon the importance as a sea route of the strait involved. Thus the delegate of the U.S.S.R. to the International Law Commission succeeded in persuading the Commission, in preparing its draft, to limit the rule to "straits normally used for international navigation." The final draft of the Commission provision, as presented to the Conference, contained this restriction.⁵⁸

In the negotiations of the Commission, moreover, Israel had failed to obtain a draft which would clearly recognize her right to use the Strait

⁵³ *Corfu Channel Case*, [1949] I.C.J. Rep. 28.

⁵⁴ See commentary to Article 17, Int. Law Commission Report (cited above) at 19-20.

⁵⁵ *Corfu Channel Case*, *loc. cit.* 28.

⁵⁶ *Ibid.* 29.

⁵⁷ *Ibid.* 28.

⁵⁸ Int. Law Commission Report (cited above), Art. 17(4) at 6.

of Tiran for her commercial shipping. It was the sense of the Commission, as stated by the delegate of the U.S.S.R., that "the question sounded far more like a case for the International Court of Justice than a matter on which the Commission should enunciate a general rule."⁵⁹

The Geneva Conference went beyond the Commission's draft, and adopted the provision set out above. The word "normally" in the Commission's phrase "normally used for international navigation" was dropped, thus making the rule one of much more general application, and avoiding arguments as to the amount of traffic using the strait in each particular case. Although the Conference, in this sense, created a new rule, and a more liberal rule than that stated by the Court in the *Corfu Channel* case, the advance made by the Conference was in the direction of the freedom of the sea.

Again, the Conference, by providing that the right obtained not only in straits linking "one part of the high seas and another part of the high seas" but also between "one part of the high seas and . . . the territorial sea of a foreign state," adopted a rule which clearly applied to the Israeli-Arab controversy. The result reached was in accord with the general position of the United States, as announced by Secretary of State Dulles in an aide-mémoire to Israeli Ambassador Abba Eban, dated February 11, 1957,⁶⁰ which recited:

With respect to (2) the Gulf of Aqaba and access thereto—the United States believes that the Gulf comprehends international waters and that no nation has the right to prevent free and innocent passage in the Gulf and through the Straits giving access thereto.

The Geneva Conference thus, in a politically charged area, achieved agreement sufficient to write a new and beneficent rule into international law.

V. THE CONTIGUOUS ZONE

It has long been recognized that enforcement of certain laws of domestic concern to a coastal state is impossible unless that state can supervise the enforcement of these laws on portions of the high seas adjacent to it. Efficient customs control is impossible if smugglers can hover, safe from the jurisdiction of the coastal state, just over three miles outside it. The United States, since 1790,⁶¹ has claimed its right to enforce anti-smuggling measures within twelve miles of its shores. Many other coastal nations have claimed similar jurisdiction beyond the three miles.⁶²

The debates in the International Law Commission sessions showed no opposition in principle to the creation of a contiguous zone, twelve miles in breadth, in which a state might protect not only its customs laws, but fiscal and sanitary interests as well.⁶³ Of course, it was understood that

⁵⁹ Doc. A/CN. 4/Ser. A/1956, p. 203; 1 Yearbook of the International Law Commission 203 (1956).

⁶⁰ 36 Dept. of State Bulletin 393 (1957).

⁶¹ Act of Aug. 4, 1790, Secs. 11-14, 1 Stat. 156-158.

⁶² See commentary to Article 66, Int. Law Commission Report, cited above.

⁶³ *Ibid.*

the powers to be given the coastal state in this area were to be limited to the protection of the interests cited, and were not to include sovereignty over the zone involved, or to alter the character of that zone as part of the high seas.

An attempt had been made, in the Hague Conference of 1930, to adopt a regime for the establishment of such a contiguous zone. The attempt was defeated predominantly because of the reluctance of Great Britain, which for the past 100 years has sought to restrict the rights of coastal states to enforce anti-smuggling measures beyond the territorial sea.⁶⁴ The British attitude led to a compromise in the rule established at Geneva. The provision as adopted reads in part:

ARTICLE 24

1. In a zone of the high seas contiguous to its territorial sea, the coastal State may exercise the control necessary to:
 - (a) Prevent infringement of its customs, fiscal, immigration or sanitary regulations within its territory or territorial sea;
 - (b) Punish infringement of the above regulations committed within its territory or territorial sea.
2. The contiguous zone may not extend beyond twelve miles from the baseline from which the breadth of the territorial sea is measured.

It will be noted, first, that the power given to the coastal state *within* its contiguous zone is one to prevent and punish infringement. The report of the Commission clearly shows that it was intended that the coastal state might exercise in the contiguous zone the control necessary to *punish* violations which occur within the territorial sea.⁶⁵ Thus, hot pursuit of a vessel which has committed an offense within the territorial sea may commence even though the vessel is first sighted, not within the territorial sea, but within the contiguous zone.

On the other hand, under subsection (a) of paragraph 1, it would seem that the coastal state might adopt laws prohibiting activity in the contiguous zone the effect of which involved an infringement of the cited interests within the territorial sea or the territory of the state. It would seem dubious, however, from the language of subsection (b), that the coastal state could *punish* infractions of rules so adopted. The United States would have preferred a stronger provision giving the coastal state the power to punish activities within the contiguous zone which had deleterious effects in the territory or territorial sea, even though the offending vessel had never entered the territorial sea. But the present provision is a step forward. By adopting it, the Geneva Conference succeeded where prior conferences had failed. It may be hoped that practice under the present provision will encourage the adoption of a stronger provision at a later time.

⁶⁴ Jesse S. Reeves, "The Codification of the Law of Territorial Waters," 24 A.J.I.L. 486, 494 (1930).

⁶⁵ See commentary (2) (a) to Article 47, Int. Law Commission Report (cited above) at 30-31.

There has been recent commentary to the effect that the adoption of a contiguous zone, as another concept in the law of the sea, standing beside that of inland waters, the territorial sea, and the continental shelf, creates a series of highly conceptual and artificial divisions of the sea.⁶⁶ There seems little chance, however, of confusion between the powers of a coastal state in its territorial sea and in its contiguous zone. The latter serves extremely restricted purposes and remains part of the high seas. It is safer to create a new zone as the area in which special powers are exercised than to risk confusion between that area and the territorial sea, which is not part of the high seas. Such confusion could mask a covert extension of the territorial sea. In the present state of international law, precision of application is to be encouraged even at the cost of conceptual multiplicity.

VI. FISHERIES AND CONSERVATION

One of the most striking accomplishments of the Geneva Conference is its adoption of a comprehensive code regulating the conservation of the natural resources of the sea. Although for some time it has been recognized that essential conservation measures were doomed unless undertaken on the basis of international co-operation, the present Convention on Fishing and Conservation is the first comprehensive international legislation to complete with arbitral procedures, on the subject.

Article 1 of the Convention recognizes the broad general right of all states to fish the high seas, subject to individual treaties and the provisions of the present Convention. Paragraph 2 of Article 1 imposes on all states a positive duty

to adopt, or to co-operate with other States in adopting, such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas.

Article 2 significantly defines conservation as

the aggregate of the measures rendering possible the optimum sustainable yield from those resources so as to secure a maximum supply of food and other marine products.

Since conservation is defined in terms of a total maximum yield, a conservation program designed to secure a larger supply of food for a particular state at the cost of a decreased total yield would not satisfy the duty imposed by Article 1.

The remaining articles of the Convention impose specific duties of co-operation in a variety of cases. Where only one state fishes a particular stock of fish in an area of the high seas, that state must take measures necessary for conservation.⁶⁷ Where two or more states are so engaged in the same area, they must, at the request of one of them, agree upon a program.⁶⁸ If, once such a program has been adopted, further states begin

⁶⁶ McDougal and Burke, "Crisis in the Law of the Sea: Community Perspectives versus National Egoism," 67 Yale L.J. 539 (1958).

⁶⁷ Convention on Fishing and Conservation of the Living Resources of the High Seas, Art. 3.

⁶⁸ *Ibid.* Art. 4, par. 1.

to fish the area, these states must accept the measures in force or reach an agreement to adopt new measures.⁶⁹ In all these cases, where agreement cannot be reached within a specified time, arbitration procedures may be invoked upon application of any party concerned.⁷⁰

Coastal states under this Convention occupy a special status as to the seas adjacent to them. They are entitled to participate in any system of research and regulation for conservation purposes, even though their nationals do not carry on fishing in the subject area.⁷¹ The coastal state may demand that the states fishing near its shores agree upon conservation measures and, unless these measures are in accord with the coastal state's system, may require agreement therewith or arbitration.⁷²

If negotiations have not, within six months, led to adoption of conservation principles, the coastal state may unilaterally adopt such measures, provided that it can show urgent need, based on scientific findings, for immediate conservation, and that the measures so adopted do not discriminate against foreign fishermen.⁷³ A program unilaterally adopted which satisfies these requirements may enter into force while negotiation continues or arbitration is undertaken.⁷⁴ In the latter case, however, the arbitral tribunal may suspend the unilateral system *pendente lite*, if it is not satisfied as to its urgency.⁷⁵

States which do not fish a particular area, but, for some reason, have a special interest in conservation of that area, may ask the states which do fish there to adopt a program, or take such states to arbitration.⁷⁶

Article 9 of the Convention establishes an arbitration procedure by a special arbitral commission of five members. Failing agreement by the interested parties as to the composition of the tribunal, the Secretary General of the United Nations is to choose one "from amongst well-qualified persons being nationals of States not involved in the dispute and specializing in legal, administrative or scientific questions relating to fisheries, depending upon the nature of the dispute to be settled."⁷⁷ Any party may have one of its nationals present at and participating in the determinations of the Commission, but without vote.⁷⁸

The Convention is a significant step forward. The fact that strict and compulsory arbitration procedures were adopted is a remarkable accomplishment in an area of intense economic concern to many nations.

The United States would have preferred that the Convention include a provision establishing the doctrine of "abstention" as a rule of international law.⁷⁹ That doctrine is to the effect that where a nation or nations have invested time and capital in the development of a fishery in a particular stock of fish, or area of the sea, nations which have not formerly fished that stock, or have not contributed to the development of the area,

⁶⁹ *Ibid.* Art. 5, par. 1.

⁷¹ *Ibid.* Art. 6, pars. 1-2.

⁷³ *Ibid.* Art. 7, pars. 1-2.

⁷⁵ *Ibid.* Art. 10, par. 2.

⁷⁷ *Ibid.* Art. 9, par. 2.

⁷⁰ *Ibid.* Art. 4, par. 2, Art. 5, par. 2.

⁷² *Ibid.* Art. 6, pars. 3-5.

⁷⁴ *Ibid.* Art. 7, par. 4.

⁷⁶ *Ibid.* Art. 8.

⁷⁸ *Ibid.* Art. 9, par. 3.

⁷⁹ Edward W. Allen, "Geneva 'Law of Sea' Conference Described," *Marine Digest*, June 14, 1958.

should abstain from fishing there in the future. The doctrine is one of conservation and of equity. It was promulgated and explained at the Conference by the United States and other nations in the sincere belief that its adoption would be in furtherance of the mutual goal of conservation.

Nevertheless, it is a difficult concept to grasp for nations whose economy is only beginning to mature. Unfortunately the principle did not secure the necessary two-thirds vote. However, the discussion of the principle at the Conference had great educational value, and several states which did not vote for it suggested a recognition of its merits.

At the conclusion of the Conference the author, as Chairman of the American Delegation, made the following statement:

The Delegation regrets nevertheless that the resolution regarding the abstention procedure did not receive the two-thirds majority required for its adoption by the Conference. The United States government considers that this procedure is an essential measure to protect and conserve the living resources of the sea. Experience demonstrates that in certain situations it is the only factor which will encourage states to expend the time, effort and money on research and management, and to impose the restraints on their fishermen that are required to restore and maintain the productivity of a stock of fish.

For these reasons the United States will continue to pursue the objective of the general acceptance of the procedure of abstention, and will enter into agreements with interested states which will incorporate this sound conservation measure.⁸⁰

VII. MISCELLANEOUS ACCOMPLISHMENTS

The Conference adopted four conventions, each of which constituted a general code of law. In addition, a series of resolutions on such subjects as nuclear tests,⁸¹ pollution of the high seas by radio-active materials, conservation conventions,⁸² coastal fisheries,⁸³ and historic waters⁸⁴ were adopted. A variety of undesirable Russian proposals, among them a resolution banning nuclear tests on the high seas—the adoption of which would have prevented the tests recently conducted at Eniwetok, and negotiations on that subject now going on in Geneva—were defeated.

It is impossible here to discuss every provision contained in this body of law, but one or two other results of the Conference should be mentioned. For example, restrictions were placed on the right of a coastal state to make the waters of a bay more than 24 miles wide into internal waters which are closed to shipping of foreign nationals.⁸⁵

⁸⁰ Cf. Doc. US/CLS/POS/49/Annex.

⁸¹ U.N. Doc. A/Conf. 13/L. 56 at 2 (1958).

⁸² *Ibid.* 3.

⁸³ *Ibid.* 4.

⁸⁴ *Ibid.* 7.

⁸⁵ *Ibid.* 8.

⁸⁶ Convention on the Territorial Sea and the Contiguous Zone, Art. 7, para. 1. Prior to the rule adopted by the Conference there was a multiplicity of views as to the maximum width of the mouth of a bay which could be considered territorial. They varied from 6 to 10 miles, to 50 miles in the case of the Canadian claim over Hudson Bay, up to 115 miles in the case of the recently asserted Soviet claim over Peter I Great Bay. 1 Oppenheim-Lauterpacht, *International Law* 505-506 (8th ed., 1955), and 37 Dept. of State Bulletin 388 (1957). In the recent Fisheries Case, involving

Further, one of the objects of the Soviets at the Conference was to obtain for landlocked countries, of which there are 14, an absolute right of transit across the territory of a coastal state, including free access to its ports and duty-free entries of goods in much the same manner as ships of other nations have the right of innocent passage in a coastal state's territorial sea in time of peace. If this had been granted and a landlocked country should, for example, adopt an ideology hostile to the coastal state, the power of the coastal state to terminate the right of transit might be called into question under international law.

But the Conference did not adopt the Soviet resolution. In Article 3 of the Convention on the High Seas it is provided merely that a state situated between the sea and a state having no seacoast need only grant such a right of transit and of equal treatment in ports by common agreement with the landlocked country, on a basis of reciprocity, and in conformity with existing international conventions. The recent agreement between Afghanistan and Pakistan, reported in the *New York Times* on July 13, 1958 (p. 33, col. 1), is a good example of such an agreement.

VIII. CONCLUSION

The Conference on the Law of the Sea in Geneva in 1958 was the first world-wide conference on the subject held since 1930. World War II had intervened. Colonialism was ending. New states were being created. Nationalism was on the increase. In nine weeks it is difficult to settle the accumulated problems of a generation. As an older maritime nation we must not be too critical of the newer nations. These nations were educated at Geneva to many of the problems involved, and there is good reason for hope of eventual agreement.

For ourselves, we must in a sympathetic manner re-examine our relations with Canada along the lines suggested by President Eisenhower in his recent speech to the Canadian Parliament,⁸⁷ as well as with Mexico and the Latin American countries. We must examine the problems of the South-east Asian nations with Japan and the problems of the newly created nations with their former masters.

Something was accomplished. We learned much and can learn more. It is fair to say, too, that we imparted something—something about our sincere desire for agreement, our willingness to compromise, and our warm concern with the problems of the smaller and younger countries of the world. We listened with respect.

With patience, humility and understanding we have contributed something, and with other nations' help can contribute much more, to an eventual solution.

a dispute between England and Norway, the International Court of Justice refused to find that any rule as to the width of such bays had acquired the status of international law, "although the 10-mile rule has been adopted by certain States both in their national law and in their treaties and conventions, and although certain arbitral decisions have applied it as between themselves." Fisheries Case, [1951] I.C.J. Rep. 131.

Under par. 6 of Art. 4, the exception for so-called "historic" bays is preserved.

⁸⁷ N. Y. Times, July 10, 1958, p. 1.

CONFERENCE ON THE LAW OF THE SEA: CONVENTION ON THE CONTINENTAL SHELF

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The United Nations Conference on the Law of the Sea met at Geneva, Switzerland, from February 24 to April 27, 1958, with representatives of 86 countries present.¹ The Conference, it will be recalled, was convoked by the Secretary General of the United Nations pursuant to Resolution 1145 (XI) adopted by the General Assembly on February 21, 1957.² By the Resolution it was stated that the General Assembly

Decides, in accordance with the recommendation contained in paragraph 28 of the report of the International Law Commission covering the work of its eighth session, that an international conference of plenipotentiaries should be convoked to examine the law of the sea, taking account not only of the legal but also of the technical, biological, economic and political aspects of the problem, and to embody the results of its work in one or more international conventions or such other instruments as it may deem appropriate.³

The General Assembly referred to the Conference the Report of the International Law Commission covering the work of its Eighth Session, 1956.⁴

^{*} This article is written in an unofficial capacity.

¹ Final Act of the United Nations Conference on the Law of the Sea (Geneva, February 24–April 27, 1958), A/CONF.13/L.58. The session of April 27 continued through the early morning of April 28, with signature taking place on April 29.

² General Assembly, 11th Sess., Official Records, Supp. No. 17 (A/3572).

³ *Ibid.*, par. 2. The General Assembly also recommended that the Conference should study “the question of free access to the sea of land-locked countries, as established by international practice or treaties.” (*Ibid.*, par. 3.)

⁴ General Assembly, 11th Sess., Official Records, Supp. No. 9 (A/3159); 51 A.J.I.L. 154 (1957).

⁵ In 1951, at its 3rd Session, the International Law Commission (hereafter referred to as ILC) adopted draft articles on the Continental Shelf, with Commentary (ILC Report, 3rd Sess., 1951, General Assembly, 6th Sess., Official Records, Supp. No. 1 (A/1858), pp. 17–19, 45 A.J.I.L. Supp. 103 at 139 (1951)). “Comments by governments on the draft articles on the continental shelf and related subjects prepared by the International Law Commission at its third session in 1951” are published in Annex I, ILC Report, 5th Sess., 1953, General Assembly, 8th Sess., Official Records, Supp. No. 1 (A/2456), beginning at p. 42.

The “Draft articles on the continental shelf,” with Commentary, constituting the second draft on the subject by the ILC, is contained in the ILC Report, 5th Sess., 1953, *ibid.*, beginning at p. 12; see also 48 A.J.I.L. Supp. 27 (1954).

In 1956, at its 8th Session, the Commission re-examined its previous draft of articles on the continental shelf “in the context of the other sections of the rules of the law of the sea.” A draft was approved by the ILC at that Session, with Commentary, which was submitted to the General Assembly (at its 11th Session) as Section III, “Conti-

treating the "Law of the Sea," as the "basis for its consideration of the various problems involved in the development and codification of the law of the sea."⁵

The Conference was ably presided over by His Royal Highness Prince Wan Waithayakon of Thailand as President of the Conference. In addition to the General Committee, the Drafting Committee, and the Cre-

mental Shelf," Part II, "High Seas," of the "Law of the Sea." (ILC Report, 8th Sess., 1956, General Assembly, 11th Sess., Official Records, Supp. No. 9 (A/3159), pp. 11-12, 40-45.) It was this draft prepared by the ILC that was the basis of discussion of the Geneva Conference on the Law of the Sea.

By Res. 1105 (XI) of Feb. 21, 1957, the General Assembly requested the U.N. Secretary General to prepare or arrange for the preparation of working documents of a legal, technical, scientific or economic nature in order to facilitate the work of the Conference (General Assembly, 11th Sess., Official Records, Supp. No. 17 (A/3572), par. 7(c)). Documentation supplied included: "Scientific Considerations Relating to the Continental Shelf," memorandum by Secretariat of U.N. Educational, Scientific and Cultural Organization (A/CONF.13/2 and *ibid.*/Add.1); "The law of the air and the articles concerning the law of the sea adopted by the International Law Commission at its eighth session," by E. Pépin, Director of the Institute of International Air Law, McGill University (A/CONF.13/4); "Comments by Governments on the Articles concerning the Law of the Sea Prepared by the International Law Commission at its Eighth Session" (A/CONF.13/5 and *ibid.*/Corr. 1, *ibid.*/Add.1 and *ibid.*/Corr.1, *ibid.*/Add.2-4); "Memorandum on pollution of the sea by oil," by U.N. Secretariat (A/CONF.13/8); "Technical Particulars Concerning the Methods of Fishing Conducted by Means of Equipment Embedded in the Floor of the Sea," by Secretariat of the U.N. Food and Agriculture Organization (A/CONF.13/12); "Examination of Living Resources Associated with the Sea Bed of the Continental Shelf with regard to the Nature and Degree of their Physical and Biological Association with Such Sea Bed," by Secretariat of the U.N. Food and Agriculture Organization (A/CONF.13/13); "Bibliographical Guide to the Law of the Sea," prepared by the U.N. Secretariat (A/CONF.13/17); "Verbatim record of the debate in the Sixth Committee of the General Assembly, at its eleventh session, relating to agenda item 53 (a)" (A/CONF.13/19); "Report of the Secretary-General on the Preparation of the Conference" (A/CONF.13/20); "Reference guide to resolutions and records concerning the law of the sea adopted by world-wide or regional international conferences and meetings" by the U.N. Secretariat (A/CONF.13/21, *ibid.*/Corr. 1), and *ibid.*/Add.1); "Guide to decisions of international tribunals relating to the law of the sea" by the U.N. Secretariat (A/CONF.13/22 and *ibid.*/Corr. 1); "List in chronological order of international agreements relating to fisheries and other questions affecting the utilization and conservation of the resources of the sea" by the U.N. Secretariat (A/CONF.13/23); "Information submitted by Governments regarding laws, decrees and regulations for the prevention of pollution of the seas" (A/CONF.13/24); "Recent Developments in the Technology of Exploiting the Mineral Resources of the Continental Shelf," by Dr. M. W. Mouton (A/CONF.13/25); "The Breadth of the Safety Zone for Installations Necessary for the Exploration and Exploitation of the Natural Resources of the Continental Shelf," by Dr. M. W. Mouton (A/CONF.13/26); "Resolutions by and Communication from the International Council of Scientific Unions concerning Part II, Section III of the Articles concerning the Law of the Sea (Continental Shelf)," transmitted by the U.N. Educational, Scientific and Cultural Organization (A/CONF.13/28); "Table of References to Comments by Governments on the Articles concerning the law of the sea adopted by the International Law Commission at its successive sessions and to the relevant statements in the Sixth Committee at the eleventh and previous sessions of the General Assembly" by the U.N. Secretariat (A/CONF.13/30 and *ibid.*/Corr.1).

⁵ General Assembly, 11th Sess., Official Records, Supp. No. 17 (A/3572), par. 9. The relevant verbatim records of the General Assembly were also referred to the Conference for consideration in conjunction with the Commission's Report. *Ibid.*

General Committee, five committees of the Conference were established, the fourth of which the subject of the "Continental Shelf" was assigned.⁶ Committee IV was extremely fortunate in its selection of Mr. A. B. Perera of Ceylon as Chairman,⁷ Mr. R. A. Quarshie of Ghana as Vice Chairman, and Mr. L. Díaz González of Venezuela as *Rapporteur*. The Secretary of Committee IV was Dr. Derek W. Bowett, Legal Office, Codification Division, Office of Legal Affairs, U.N. Secretariat.

The Fourth Committee, having considered the report of the General Committee of the Conference as adopted by the Conference, decided on March 3, at its Third Meeting, to begin its work by a "brief general discussion" on the articles referred to it.⁸ Ten of its forty-two meetings were devoted to a general debate on the subject of the continental shelf.

It is difficult to say whether the time spent in general discussion appreciably furthered the work. True, a certain amount of general discussion in Plenary was avoided. At the same time, the procedure recommended by the General Committee and adopted by each of the five committees shortened the time otherwise at the disposal of the respective committees for article-by-article consideration of the drafts prepared by the International Law Commission. In the general discussion, speakers freely discussed any aspect of the matter they desired, so that there was a lack of continuity in the discussion, save that it related to some or several aspects of the continental shelf.¹¹

This statement of the representative of the United States¹² in Committee

⁶ The Rules of Procedure (A/CONF.13/35), adopted by the Conference in Plenary on Feb. 24, 1958 (A/CONF.13/SR.1, p. 8), established in Rule 47 that the Fourth Committee should be a main committee of the Conference and that this committee should consider those articles concerning the law of the sea which dealt with the continental shelf. Those articles of the 1956 ILC draft were Arts. 67-73 inclusive.

⁷ A/CONF.13/C.4/SR.1, p. 2. All references to Summary Records (SR) herein are to the Provisional Summary Records.

⁸ A/CONF.13/C.4/SR.2, p. 2.

⁹ A/CONF.13/L.2; A/CONF.13/C.4/SR.3, p. 2.

¹⁰ The Report of the Fourth Committee, April 19, 1958, states that "The Committee held 41 meetings during the course of the Conference." (A/CONF.13/L.12.) The draft of the Report of the Fourth Committee (A/CONF.13/C.4/L.67) was adopted on April 18, 1958, at the 42nd Meeting of Committee IV (A/CONF.13/C.4/SR.42).

¹¹ The idea of "internationalization" of the shelf found slight support. The German Federal Republic proposed "self-executing rules governing the exploration and exploitation of the subsoil of the sea" in favor of the international community (A/CONF.13/C.4/L.1; A/CONF.13/C.4/SR.6, pp. 2-3). The representative of Monaco seemed to favor internationalization and suggested establishment of an international office of the shelf in conformity with Arts. 55 and 59 of the Charter of the United Nations (A/CONF.13/C.4/SR.9, p. 12). The representative of Japan pointed to the "general-recognized" need to exploit the resources of the continental shelf for the benefit of mankind, and stated that Japan could not admit that it was necessary to vest a monopoly of rights in the coastal state (*ibid.*, p. 2).

¹² The spokesman of the U. S. Delegation in Committee IV was Miss Marjorie M. Whiteman, Assistant Legal Adviser, Department of State. U. S. Advisers on Committee IV were: Mr. Paul Averitt, Geological Survey, Department of Interior; Mr. Warren L. Baker, General Counsel, Federal Communications Commission; Captain Rafael C. Benitez, U.S.N., Office of the Secretary of Defense; Mr. William R. Neblett, Executive Director, National Shrimp Congress, Tallahassee, Florida; Dr. G. Etze

IV made in the course of the general discussion dealt with United States policy as to the continental shelf enunciated in the Truman Proclamation of 1945 and in the "Outer Continental Shelf Lands Act" of 1947, the former reciting that "The character as high seas of the waters above the continental shelf" was "in no way thus affected" by the Proclamation,¹³ and the latter reciting, in Section 3(b), that

This Act shall be construed in such manner that the character as high seas of the waters above the outer Continental Shelf and the right to navigation and fishing therein shall not be affected.¹⁴

After commenting on various phases of the International Law Commission (ILC) Draft Articles on the Continental Shelf, the U. S. representative took the opportunity to point out that

Of all the subjects included within the scope of the seventy-three articles of the draft prepared by the International Law Commission, none—as a group—treat of more recent concepts than those pertaining to the continental shelf. Prior to very recent years, the legal status of the continental shelf, outside the recognized territorial seas was, in considerable measure, undefined. But the progress of events now requires an expansion of international law in this area.

Much of the work of Committee IV lies in the realm of the "progressive development of international law," envisaged in Article 13 (a) of the Charter of the United Nations, and in Article 15 of the Statute of the International Law Commission. At the same time consideration must be given to such international law as may now exist in connection with the subject matter to be dealt with, as for example existing international law with respect to the freedom of the seas.

At the same time, the U. S. representative on Committee IV gave assurance that the United States Delegation was prepared to work in a joint effort to achieve a satisfactory document with respect to the continental shelf.¹⁵

Committee IV began its article-by-article consideration of Articles 67–73 of the ILC draft at its 13th Meeting, March 20, 1958, and in the course of that meeting and twenty-nine subsequent meetings approved draft articles on the continental shelf,¹⁶ adopted by the Conference in Plenary in convention form.¹⁷

Pearcy, Geographer, Department of State; Dr. Oscar E. Sette, Fish and Wildlife Service, Department of Interior; Mr. William M. Terry, Fish and Wildlife Service, Department of Interior; and Mr. Marten H. A. van Heuven, Office of the Legal Adviser, Department of State.

For membership of the U. S. Delegation see A/CONF.13/L.6. Mr. Arthur H. Dean of New York was Chairman of the Delegation. Mr. William Sanders, Special Assistant to the Under Secretary of State, was Vice Chairman.

¹³ President Truman's Proclamation, Sept. 28, 1945, No. 2667, 59 Stat., Pt. 2, p. 884, 3 CFR, 1943–1948 Comp., p. 67; and White House Press Release, Sept. 28, 1945, 13 Dept. of State Bulletin 484–485 (1945); 40 A.J.I.L. Supp. 45 (1946).

¹⁴ Outer Continental Shelf Lands Act, approved Aug. 7, 1953, 67 Stat. 462 (P. L. 212); 48 A.J.I.L. Supp. 110 (1954).

¹⁵ March 14, 1958, A/CONF.13/C.4/SR.10, pp. 4–5; US/PR 6, March 14, 1958.

¹⁶ Report of the Fourth Committee, A/CONF. 13/L. 12.

¹⁷ Final text of Convention on the Continental Shelf adopted by the Conference, Final Act, A/CONF.13/L.58; *ibid.*/L.55, printed below, p. 858.

ARTICLE 1

(based on Article 67, ILC draft)

The text of the article containing the definition of the continental shelf is set forth in Article 1 of the Convention. It reads:

For the purposes of these articles, the term "continental shelf" is used as referring (a) to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas; (b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands.¹⁸

The 1951 draft of the ILC had defined the continental shelf as follows:

As here used, the term "continental shelf" refers to the seabed and subsoil of the submarine areas contiguous to the coast, but outside the area of territorial waters, where the depth of the superjacent waters admits of the exploitation of the natural resources of the seabed and subsoil.¹⁹

The corresponding article of the 1953 draft of the ILC read:

As used in these articles, the term "continental shelf" refers to the seabed and subsoil of the submarine areas contiguous to the coast, but outside the area of the territorial sea, to a depth of two hundred metres.²⁰

The 1956 draft of the ILC, on which the Geneva draft is based to a considerable extent, read:

For the purposes of these articles, the term "continental shelf" is used as referring to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres (approximately 100 fathoms) or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas.²¹

¹⁸ *Ibid.*, p. 1.

¹⁹ ILC Report, 3rd Sess., 1951, General Assembly, 6th Sess., Official Records, Supp. No. 9 (A/1858), p. 17. The United States in its comment on the 1951 draft of the ILC did not comment specifically upon this article. Speaking generally, it merely stated: "the Government of the United States is in general agreement with the principles which appear to inspire the draft articles of part I, Continental Shelf." (Printed in ILC Report, 5th Sess., 1953, Annex II, General Assembly, 8th Sess., Official Records, No. 9 (A/1456), pp. 42, 70-71.)

²⁰ *Ibid.*, p. 12. In its comment on the ILC 1953 draft on the Law of the Sea, the United States did not comment specifically on this article.

²¹ ILC Report, 8th Sess., 1956, *loc. cit.*, p. 41.

It is to be borne in mind that meanwhile the Resolution of Ciudad Trujillo set forth for consideration by the American States the following conclusion:

"1. The seabed and subsoil of the continental shelf, continental and insular terrace, or other submarine areas, adjacent to the coastal state, outside the area of the territorial sea, and to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the seabed and subsoil, appertain exclusively to that state and are subject to its jurisdiction and

There were numerous proposals to change or amend the draft of this article as it came from the ILC. In spite, however, of considerable dissatisfaction voiced in Committee IV with the ILC draft, the only proposal obtaining a majority vote in Committee IV was a proposal by the Philippines to add a second paragraph to the ILC text to read:

All references in these articles to "continental shelf" shall be understood to apply also to similar submarine areas adjacent to and surrounding the coasts of islands.²²

Proposals defeated would have substituted the following criteria: 550 meters but not over 100 miles from the outer limit of the territorial sea, proposed by Yugoslavia;²³ deletion of depth-of-exploitability test, proposed by France and Lebanon;²⁴ 550-meters test only, proposed by India;²⁵ shelf edge or 200 meters, Canadian proposal embraced by Germany;²⁶ shelf edge or 550 meters, proposed by Canada;²⁷ shelf and slope (continental terrace), proposed by Panama;²⁸ and exploitability test only, proposed by Korea.²⁹

The ILC text, as amended, was approved in Committee IV by a vote of 51 (U. S.) in favor, 9 votes against, with 10 abstentions.³⁰ The United States supported the ILC text as drafted³¹ and voted in favor of the Philippine proposal.

control." (Resolution I, Final Act, Inter-American Specialized Conference on "Conservation of Natural Resources: The Continental Shelf and Marine Waters," signed March 28, 1956, p. 13.)

This text had its origin in a proposal of the Dominican Republic, which without directly defining the continental shelf, would have given control over its soil and subsoil "up to a limit in which these operations (exploration and development) can be efficiently and effectively extended."

²² A/CONF.13/C.4/L.26. This proposal was approved by a vote of 31 (U. S.) in favor; 10 against; and 25 abstentions. A/CONF.13/C.4/SR.19 (March 25, 1958), p. 4.

The Committee decided to consider all proposals as amendments to the ILC text, and accordingly the amendments were voted upon prior to any vote upon the ILC text.

²³ A/CONF.13/C.4/L.12; A/CONF.13/C.4/SR.19, p. 2 ["200 metres" replaced by "550 metres"].

²⁴ A/CONF.13/C.4/L.7; A/CONF.13/C.4/L.8.

²⁵ A/CONF.13/C.4/L.29/Rev. 1.

²⁶ A/CONF.13/C.4/L.30; A/CONF.13/C.4/SR.19, p. 3.

²⁷ A/CONF.13/C.4/L.30; A/CONF.13/C.4/SR.19, pp. 2, 3 ["200 metres" replaced by "550 meters"].

²⁸ A/CONF.13/C.4/L.4.

²⁹ A/CONF.13/C.4/L.11.

³⁰ A/CONF.13/C.4/SR.19 (March 25, 1958), pp. 4-5.

The text as adopted was subsequently referred to a Drafting Group established by Committee IV, as were other articles subsequently adopted by the Committee. The Drafting Group was comprised of members of the Bureau and the following six representatives on Committee IV: Miss Whiteman (United States of America), Mr. Molodtsov (Union of Soviet Socialist Republics), Mr. Patey (France), Mr. Wershof (Canada), Mr. Barros (Chile), and Mr. Jhirad (India). Mr. Perera chaired the group. In addition to the Chairman, other members of the Bureau were: the Vice Chairman, the *Rapporteur*, and the Secretary.

³¹ A/CONF.13/C.4/SR.16 (March 21, 1958), p. 7.

ARTICLE 2

(based on Article 68, ILC draft)

Article 2 of the Convention reads:

1. The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.

2. The rights referred to in paragraph 1 of this article are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities, or make a claim to the continental shelf, without the express consent of the coastal State.

3. The rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation.

4. The natural resources referred to in these articles consist of the mineral and other non-living resources of the sea-bed and subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the sea-bed or are unable to move except in constant physical contact with the sea-bed or the subsoil.³²

Article 2 of the 1951 draft of the ILC read:

The continental shelf is subject to the exercise by the coastal State of control and jurisdiction for the purpose of exploring it and exploiting its natural resources.³³

The 1953 draft of the comparable article (Article 68) of the ILC draft read:

The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring and exploiting its natural resources.³⁴

The 1956 text of Article 68 of the ILC draft was identical with the 1953 draft.³⁵

The Commentary prepared by the ILC with respect to this article of its 1956 draft included the following statement:

The Commission desired to avoid language lending itself to interpretations alien to an object which the Commission considers to be

³² Final Act, A/CONF.13/L.58; *ibid.*/L.55, p. 1.

³³ ILC Report, 3rd Sess., 1951, General Assembly, 6th Sess., Official Records, Supp. No. 9 (A/1858), p. 18. The United States, in its comment on the 1951 draft stated:

"This Government is under the impression that the draft articles in part I, Continental Shelf, intend to establish in favor of the coastal State an exclusive right to the exploration of the continental shelf and the exploitation of its resources. This Government wonders, accordingly, whether it would not be advisable to make it clear, at least in the commentaries, that control and jurisdiction for the purpose indicated in the draft articles mean in fact an exclusive, but functional, right to explore and exploit." (ILC Report, 5th Sess., 1953, Annex II, General Assembly, 8th Sess., Official Records, Supp. No. 9 (A/2456), p. 70.)

³⁴ *Id.*, p. 12.

³⁵ ILC Report, 8th Sess., 1956, *loc. cit.*, p. 42.

of decisive importance, namely, the safeguarding of the principle of the full freedom of the superjacent sea and the airspace above it. Hence it was unwilling to accept the sovereignty of the coastal State over the seabed and subsoil of the continental shelf. On the other hand, the text as now adopted leaves no doubt that the rights conferred upon the coastal State cover all rights necessary for and connected with the exploration and exploitation of the natural resources of the continental shelf. Such rights include jurisdiction in connexion with the prevention and punishment of violations of the law. The rights of the coastal State are exclusive in the sense that, if it does not exploit the continental shelf, it is only with its consent that anyone else may do so.³⁶

The relationship of the coastal state to the continental shelf posed an exceedingly difficult question in Committee IV. The articles of the ILC draft were considered in the order in which they appeared in the 1956 ILC draft. Accordingly, it was impossible, at the time Article 68 of the ILC draft was considered, to forecast the fate of Article 69, an article having to do with the status of the waters above the shelf and that of the airspace above those waters. It was well known, of course, that certain states desired that rights with respect to the continental shelf should affect the legal status of the waters above the shelf and the superjacent airspace. In that light, at least, it seemed desirable to some states, including the United States, to "play it safe" by avoiding the use of the term "sovereignty," or even "sovereign rights" in defining the relation of the coastal state to the continental shelf. Certain other states were of opinion, simply or in combination with this latter view, that the use of the term "sovereignty" or "sovereign rights" was incorrect in this context.

The United States proposed, in harmony with the ILC Commentary quoted above,³⁷ the deletion of the word "sovereign" and the substitution of the word "exclusive" in the ILC 1956 text, so that the article would read:

The coastal state exercises over the continental shelf exclusive rights for the purpose of exploring and exploiting its natural resources.³⁸

In introducing the Delegation's proposal, the U. S. representative made it clear that the U. S. Delegation was opposed to anything which might even remotely cast doubt upon the status of the superjacent waters and airspace. The fact, she said, that the ILC draft of Article 69 contained clearly-defined provisions on the matter was not enough; the Committee was discussing Article 68, and should strive to perfect it rather than depend upon a subsequent and unapproved article for clarification.³⁹

The Federal Republic of Germany proposed that the text for this article read: "The coastal State exercises over the continental shelf the rights defined in article 71 for the purpose of exploring and exploiting its mineral resources";⁴⁰ and explained:

³⁶ *Ibid.*

³⁸ A/CONF.13/C.4/L.31.

⁴⁰ A/CONF.13/C.4/L.43.

³⁷ *Ibid.*

³⁹ A/CONF.13/C.4/SR.20, pp. 5-6.

The grant to the coastal State of rights over the continental shelf outside the territorial sea raises doubts about possible repercussions of the exercise of those rights on the freedom of the high seas. These doubts would be lessened if the rights in question were enumerated and more fully defined. The delegation of the Federal Republic of Germany therefore considers that article 71 should be amplified and article 68 consequently worded as proposed above.⁴¹

In the subsequent voting, this text (with the exception of the word "mineral") was voted upon first, with the result that it was rejected by 52 votes to 7, with 6 abstentions.⁴² The United States voted against it.

A Mexican proposal for the text of this article read:

The coastal State exercises sovereignty over the sea-bed and subsoil of the continental shelf and over the natural resources thereof, to the exclusion of other States, physical or virtual occupation not being a necessary condition.⁴³

This proposal, the second text voted on, was defeated by 24 votes in favor, 37 votes against, and 6 abstentions.⁴⁴ The United States voted against this proposal.

A Netherlands proposal reading "The coastal State exercises exclusive rights for the purpose of exploring and exploiting the natural resources of its continental shelf,"⁴⁵ was, in turn, defeated by 4 votes in favor, 40 against, and 22 abstentions.⁴⁶

The United States proposal, quoted above, was then approved in Committee by the narrow vote of 21 votes in favor, 20 against, and 27 abstentions.⁴⁷

However, at the 8th Plenary Session, it having meanwhile become evident, *inter alia*, that the legal status of the superjacent waters and overlying airspace was to be unaffected by provisions of the articles on the continental shelf, the United States, in order that the article should find wider support, found itself in a position to recede from its former position and support the 1956 ILC wording of "sovereign rights" in place of "exclusive rights."⁴⁸ The vote in Plenary in favor of the first paragraph of Article 2 as it now appears in the Convention was 51 (U. S.) votes to 14, with 6 abstentions.⁴⁹

Article 2, paragraph 2, had its origin in part in the second paragraph of a Yugoslav proposal, which read:

2. If the coastal State does not exercise the rights under paragraph 1 of the present article, no one may lay claim to its continental shelf without its express agreement.⁵⁰

Article 2, paragraph 2, was also based on an Argentine proposal which read:

⁴¹ *Ibid.*

⁴² A/CONF.13/C.4/L.2.

⁴³ A/CONF.13/C.4/L.19/Rev. 1.

⁴⁴ *Ibid.*, pp. 5-6.

⁴⁵ *Ibid.*, p. 11.

⁴⁶ A/CONF.13/C.4/SR. 24, p. 5.

⁴⁷ A/CONF.13/C.4/SR.24, p. 5.

⁴⁸ A/CONF.13/C.4/SR. 24, p. 5.

⁴⁹ A/CONF.13/SR.8, pp. 8-9.

⁵⁰ A/CONF.13/C.4/L.13.

The rights of the coastal State are exclusive in the sense that if that State does not explore or exploit the continental shelf no other may undertake these activities without its consent.⁵¹

Each of these proposals was approved by sizeable majorities and the Drafting Group of Committee IV then combined the two texts.⁵²

The third paragraph of Article 2, which is an exact reproduction of paragraph (7) of the ILC Commentary on Article 68 of its 1956 draft,⁵³ was included in the text of the article on the proposal of the Cuban Delegation.⁵⁴

Paragraph 4, setting forth a definition of the "natural resources" as used in the articles, provided the occasion for considerable discussion. The text as approved in Committee IV was the result of a Joint Proposal tabled by Australia, Ceylon, the Federation of Malaya, India, Norway and the United Kingdom.⁵⁵ That text as adopted (41(U. S.):11:17)⁵⁶ in Committee IV contained the following additional final phrase: "; but crustacea and swimming species are not included." A Mexican oral proposal to delete the words "crustacea and" failed of approval in Committee IV by a vote of 27:27(U. S.) with 13 abstentions.⁵⁷ At the 8th Plenary Session of the Conference the final phrase "; but crustacea and swimming species are not included in this definition" was rejected with the approval of Australia,⁵⁸ the phrase being voted upon in two parts.⁵⁹

The vote in Committee IV on Article 68 as a whole was 34(U. S.) to 14, with 17 abstentions.⁶⁰ The vote on Article 2 in Plenary Session was 59(U. S.):5, with 6 abstentions.⁶¹

In explaining the meaning of the amendment to Article 68 submitted jointly by his own and other delegations, Professor Bailey of Australia stated (in Committee IV) that it "was merely a detailed expression of the principle laid down in the International Law Commission's commentary on the article."⁶² He continued:

⁵¹ A/CONF.13/C.4/L.6/Rev. 2.

⁵² A/CONF.13/C.4/SR.24, p. 7.

⁵³ ILC Report, 8th Sess., 1956, *loc. cit.*, p. 42.

⁵⁴ A/CONF.13/C.4/L.45 and Corr. 1; A/CONF.13/C.4/SR.26, pp. 2-4.

⁵⁵ A/CONF.13/C.4/L.36.

⁵⁶ A/CONF.13/C.4/SR.24, p. 7.

⁵⁷ *Ibid.*

⁵⁸ A/CONF.13/SR.8, pp. 11, 12. Australia had, meanwhile, come to regard the phrase as superfluous.

⁵⁹ The words "crustacea and" were rejected on roll call by a vote of 22 in favor, 42 against and 6 abstentions. The voting was confused, in part for the reason that it apparently was not clear whether an affirmative vote was a vote in favor of retention or in favor of deletion of these words. Ceylon, Malaya, Norway and the United Kingdom voted "In favour"; while Australia (the first vote called) and India voted "Against." The United States abstained on the vote (*ibid.*, pp. 11-12). The remaining words "but . . . swimming species are not included in this definition" were rejected by 14 votes in favor, 43 votes against and 9 abstentions (*ibid.*, p. 12).

⁶⁰ A/CONF.13/C.4/SR.24, p. 9.

⁶¹ A/CONF.13/SR. 8, p. 12.

⁶² Pars. 3 and 4 of the ILC Commentary on this article of its 1956 draft read:

"(3) At its fifth session, the Commission decided after long discussion to retain the term 'natural resources,' as distinct from the more limited term 'mineral resources.' In its previous draft the Commission has only dealt with 'mineral resources' and some

The reason why a definition of "natural resources" was necessary was clear from the Commission's commentary. The Commission had agreed that the drafting of a definition required a combination of legal and scientific experience which it lacked. The joint amendment was the result of close consultation between lawyers and biologists.

The resources covered by the definition proposed in the joint amendment were "mineral and other non-living resources" and also "living organisms belonging to sedentary species." Most of the non-living resources of the seabed and the subsoil were, of course, mineral resources, but the words "and other non-living resources" had been added so that the article would apply to resources such as the shells of dead organisms. So far as the living resources in question were concerned, the sponsors of the amendment had acted on the basis of considerations of legal principle and practical utility. They considered that it was the permanent intimate association of certain living organisms with the seabed which justified giving the coastal States exclusive rights in regard to such organisms. The words "living organisms belonging to sedentary species" did not cover all "the products of 'sedentary' fisheries," which was the term used by the Commission in paragraph (3) of its commentary. The permanent association of some living resources with mineral resources of the seabed and subsoil was such that it was best that both those types of resources should be exploited jointly. They were harvested in such a way that it was appropriate to give the coastal State exclusive rights in respect of both types. Some sedentary living organisms were such permanent features of the seabed that it was inadvisable to provide that they might be exploited by any State.

The living organisms of the seabed and subsoil belonging to sedentary species comprised coral, sponges, oysters, including pearl-oysters, pearl shell, the sacred chank of India and Ceylon, the trochus and plants.

It would be senseless to give coastal States exclusive rights over mineral resources such as the sands of the seabed but not over the coral, sponges and the living organisms which never moved more than a few inches or a few feet on the floor of the sea.

The sponsors of the amendment had agreed that no crustacea or swimming species should be covered by the definition. Swimming species were obviously not sedentary. It was true that the term "crustacea" included all crabs, of which some species were unable to move except in contact with the seabed or subsoil; but those species could move considerable distances.

members proposed adhering to that course. The Commission, however, came to the conclusion that the products of 'sedentary' fisheries, in particular, to the extent that they were natural resources permanently attached to the bed of the sea should not be left outside the scope of the régime adopted, and that this aim could be achieved by using the term 'natural resources.' It is clearly understood that the rights in question do not cover so-called bottom-fish and other fish which, although living in the sea, occasionally have their habitat at the bottom of the sea or are bred there.

"(4) At the eighth session it was proposed that the condition of permanent attachment to the seabed should be mentioned in the article itself. At the same time the opinion was expressed that the condition should be made less strict; it would be sufficient that the marine fauna and flora in question should live in constant physical and biological relationship with the seabed and the continental shelf; examination of the scientific aspects of that question should be left to experts. The Commission however decided to leave the text of the article and of the commentary as it stood." ILC Report, 8th Sess., 1956, *loc. cit.*, p. 42.

He considered that the amendment represented a balanced compromise between the requirements of coastal States and the need to maintain the freedom of the high seas. Some of the sponsors of the amendment were States of which the people fished only off their own coasts; others were States with fishing fleets which operated in distant waters. The amendment had the advantage of clarity and also the advantage of stability, two points to which the International Law Commission attached great importance.⁶³

The United States, during the course of the debate in Committee IV, stated that it was prepared to support the six-Power amendment, if, as appeared likely, the majority of the members of the Committee were prepared to accept it as a compromise.⁶⁴

Just prior to the voting in Committee IV on paragraph 4 of Article 2, the U. S. representative raised the following specific question "as a point of clarification":

I should like the sponsors of the joint text to make a clarification as to the intended meaning of "harvestable stage" in proposal /L.36. Does "harvestable stage" mean the stage of life during which the resources are harvestable or the particular moment at which they are captured? I should like to have this point made clear.

To this Professor Bailey replied from the floor that the intended meaning of "harvestable stage" in /L.36 was "that stage of life during which the resources are harvestable."

ARTICLE 3

(based on Article 69, ILC draft)

Article 3 of the Convention is identical with Article 69 of the ILC 1956 draft.⁶⁵ It reads:

The rights of the coastal State over the continental shelf do not affect the legal status of the superjacent waters as high seas, or that of the airspace above those waters.⁶⁶

Originally, five amendments to Article 69 were proposed in Committee IV. Of these, three were withdrawn prior to the voting,⁶⁷ leaving two proposals to be voted upon prior to the vote on the ILC text.

An Argentine proposal read:

The rights of the coastal State over the continental shelf do not affect the regime of freedom of navigation on the high seas or that of the air-space above the superjacent waters or the epicontinental sea.⁶⁸

⁶³ A/CONF.13/C.4/SR.21, pp. 7-8.

⁶⁴ A/CONF.13/C.4/SR.22, p. 13.

⁶⁵ ILC Report, 8th Sess., 1956, *loc. cit.*, p. 43.

⁶⁶ Final Act, A/CONF.13/L.58; *ibid.*/L.55, p. 2.

⁶⁷ British proposal (A/CONF.13/C.4/L.27) withdrawn in view of Committee's decision on Art. 67 (A/CONF.13/C.4/SR. 25, p. 7); Netherlands proposal (A/CONF.13/C.4/L.20) withdrawn for similar reason (A/CONF.13/C.4/SR.25, p. 7); Bulgarian proposal (A/CONF.13/C.4/L.41, military bases or installations), withdrawn prior to voting on Art. 69, to be reintroduced in connection with Art. 71 (A/CONF.13/C.4/SR.26, p. 11). See note 122 below.

⁶⁸ A/CONF.13/C.4/L.6.

Dr. Moreno explained the Argentine proposal as follows:

... his proposal ... sought to amend the International Law Commission's text in two respects; first, for reasons of technical accuracy, it introduced the term "epicontinental sea" as distinct from "superjacent waters." The epicontinental sea was that part of the high seas which actually covered the continental shelf. Secondly, the proposal spoke of "the regime of freedom of navigation on the high seas" instead of "the legal status of the superjacent waters as high seas." Of the four freedoms of the high seas expressly mentioned in article 27, only the freedom of navigation remained untouched by the provisions of articles 70 and 71; consequently, the freedom envisaged in article 69 was substantially different from that proclaimed by article 67, a fact which should find reflection in the text.⁶⁹

At another point in the discussion of Article 69, Dr. Moreno explained further:

... Freedom of fishing on the high seas was referred to in Article 27 without reservation, but he did not consider that that freedom should be reiterated in article 69 in view of the rights of the coastal State recognized in articles 67 and 68. The aim of his delegation's proposal was not to prohibit or restrict fishing in the superjacent waters, but to define the rights of the coastal State to regulate its coastal fisheries for the purpose of conservation.⁷⁰

Prior to the voting on Article 69, Dr. Moreno stated that he was prepared to drop the words "or the epicontinental sea" from his proposal.⁷¹

The United States Delegation strongly supported the ILC text of Article 69, explaining that "The importance of the principle [of the freedom of the seas] had been stressed by the Commission in its commentary on article 69 which referred to the régime of the continental shelf as being subject to and within the orbit of the paramount principle of the freedom of the seas and of the air space above them"; that the "freedoms in question were itemized in Article 27"; and that "The United States Delegation would be unable to vote for the Argentine proposal, which would restrict the freedom of the high seas to freedom of navigation."⁷²

The Argentine proposal was rejected by a vote of 10 in favor, 40 (U.S.) against, and 10 abstentions.⁷³

A Yugoslav proposal read:

Before the text of article 69 insert the following:

"Subject to the restrictions referred to in article 71 of the present Convention . . ."⁷⁴

The United States Delegation did not consider that this proposed amendment was necessary, since any legal provision was to be interpreted in the light of the remainder of the document of which it was a part.⁷⁵ The proposal was rejected by 8 votes in favor, 31 (U. S.) against, and 19 abstentions.⁷⁶

⁶⁹ A/CONF.13/C.4/SR.26, p. 5.

⁷¹ *Ibid.*

⁷³ *Ibid.*, p. 11.

⁷⁵ A/CONF.13/C.4/SR.26, p. 9.

⁷⁰ *Ibid.*, p. 10.

⁷² *Ibid.*, p. 9.

⁷⁴ A/CONF.13/C.4/L.14.

⁷⁶ *Ibid.*, p. 11.

The text as drafted by the ILC was approved in Committee IV by a vote of 54(U. S.) votes in favor, to none against, with 8 abstentions.⁷⁷ The vote in Plenary Session was 43(U. S.) votes in favor, to none against, with 3 abstentions.⁷⁸

ARTICLE 4

(based on Article 70, ILC draft)

Article 4 of the Convention reads:

Subject to its right to take reasonable measures for the exploration of the continental shelf and the exploitation of its natural resources, the coastal State may not impede the laying or maintenance of submarine cables or pipe lines on the continental shelf.⁷⁹

The text is identical with Article 70 of the ILC draft⁸⁰ save that the words "or pipe lines" were inserted by the Conference. The insertion was based on a proposal put forward by the United Kingdom.⁸¹ The United Kingdom representative in Committee IV, Miss Joyce Gutteridge, explained that the proposal was based on the ILC Commentary on Article 70 which stated that, in principle, pipelines should be included in the provisions of the article; that any difficulties which might arise with regard to pipelines would be covered by the right of the coastal state to take reasonable measures for the exploration of the continental shelf and the exploitation of its natural resources; and that, moreover, if pipelines were included in paragraph 2 of Article 61, they should not be omitted from Article 70.⁸²

The representative of the United States, in supporting the ILC draft of the article, pointed out⁸³ that Article 70 placed limitations on the freedom to lay submarine cables formulated in Article 27 of the ILC draft; that the 1884 Convention for the Protection of Submarine Cables prohibited interference with submarine cables; and that, accordingly, some provision was necessary to allow coastal states to take measures for the exploration of the continental shelf which might affect submarine cables. In her view, no more definite criterion than that of reasonableness could be established for the measures which coastal states might take, for the reason that it was impossible to foresee all situations that might arise in the application of Article 70. She also explained that Articles 69, 70 and 71 dealt with the four freedoms of the high seas formulated in Article 27 of the ILC text,⁸⁴ insofar as they affected the continental shelf; and that if Article 70 were omitted as proposed by The Netherlands,⁸⁵ the

⁷⁷ *Ibid.*

⁷⁸ A/CONF.13/SR.9, p. 2.

⁷⁹ Final Act, A/CONF.13/L.58; *ibid.*/L.55, p. 2.

⁸⁰ ILC Report, 8th Sess., 1956, *loc. cit.*, p. 43.

⁸¹ A/CONF.13/C.4/L.27.

⁸² A/CONF.13/C.4/SR.27, p. 3.

⁸³ *Ibid.*, p. 5.

⁸⁴ Art. 27 dealt with (1) freedom of navigation, (2) freedom of fishing, (3) freedom to lay submarine cables and pipelines, and (4) freedom to fly over the high seas. ILC Report, 8th Sess., 1956, *loc. cit.*, p. 24.

⁸⁵ A/CONF.13/C.4/L.21.

section would be incomplete, since no provision would be made for pipelines. The United States supported the United Kingdom proposal, which was subsequently approved in Committee IV by 32(U. S.) votes in favor, 7 against, and 16 abstentions.⁸⁶

A Venezuelan proposal for Article 70 read:

Subject to its right to take reasonable measures for the exploration of the continental shelf and the exploitation of its natural resources, and to its right to make regulations [, pursuant to article 61, paragraph 2, concerning the routes to be followed,]⁸⁷ the coastal State may not impede the laying or maintenance of submarine cables on the continental shelf.⁸⁸

The United States representative explained that she could not support the Venezuelan text for the reason that it failed to provide any standards for the regulations to be made.⁸⁹ The Venezuelan proposal was rejected in Committee IV by 22 votes to 18, with 15 abstentions.⁹⁰

The ILC proposal, as amended, was approved in Committee by 48(U. S.) votes in favor, none against, and 8 abstentions.⁹¹ The vote in Plenary Session on Article 4 was 45(U. S.) in favor, none against, and 2 abstentions.⁹²

ARTICLE 5

(based on Article 71, ILC draft)

Article 5 of the Convention reads:

1. The exploration of the continental shelf and the exploitation of its natural resources must not result in any unjustifiable interference with navigation, fishing or the conservation of the living resources of the sea, nor result in any interference with fundamental oceanographic or other scientific research carried out with the intention of open publication.

2. Subject to the provisions of paragraphs 1 and 6 of this article, the coastal State is entitled to construct and maintain or operate on the continental shelf installations and other devices necessary for its exploration and the exploitation of its natural resources, and to establish safety zones around such installations and devices and to take in those zones measures necessary for their protection.

3. The safety zones referred to in paragraph 2 of this article may extend to a distance of 500 metres around the installations and other devices which have been erected, measured from each point of their outer edge. Ships of all nationalities must respect these safety zones.

4. Such installations and devices, though under the jurisdiction of the coastal State, do not possess the status of islands. They have no territorial sea of their own, and their presence does not affect the delimitation of the territorial sea of the coastal State.

5. Due notice must be given of the construction of any such in-

⁸⁶ A/CONF.13/C.4/SR.27, p. 9.

⁸⁷ Words in brackets withdrawn prior to voting.

⁸⁸ A/CONF.13/C.4/L.34.

⁸⁹ A/CONF.13/C.4/SR. 27, p. 6.

⁹⁰ *Ibid.*, p. 9.

⁹¹ *Ibid.*

⁹² A/CONF.13/SR.9, p. 2.

installations, and permanent means for giving warning of their presence must be maintained. Any installations which are abandoned or disused must be entirely removed.

6. Neither the installations or devices, nor the safety zones around them, may be established where interference may be caused to the use of recognized sea lanes essential to international navigation.

7. The coastal State is obliged to undertake, in the safety zones, all appropriate measures for the protection of the living resources of the sea from harmful agents.

8. The consent of the coastal State shall be obtained in respect of any research concerning the continental shelf and undertaken there. Nevertheless, the coastal State shall not normally withhold its consent if the request is submitted by a qualified institution with a view to purely scientific research into the physical or biological characteristics of the continental shelf, subject to the proviso that the coastal State shall have the right, if it so desires, to participate or to be represented in the research, and that in any event the results shall be published.⁹³

As to paragraph 1 of this article, the corresponding paragraph of Article 71 of the 1956 ILC draft read:

1. The exploration of the continental shelf and the exploitation of its natural resources must not result in any unjustifiable interference with navigation, fishing or the conservation of the living resources of the sea.⁹⁴

The change in paragraph 1 resulted from adoption of a proposal put forward by Denmark, which read:

Add at the end of paragraph 1:

"nor in any interference with fundamental oceanographic research carried out with the intention of open publication."⁹⁵

Dr. Sørensen of Denmark explained that this proposal⁹⁶ referred to "fundamental oceanographic research only." "Oceanography," he said, "was a study of the phenomena of the ocean, which included the seabed as well as the ocean waters but did not extend to the subsoil." "Hence," he added, "there was no danger of those engaged in oceanographic research also exploring the subsoil of the continental shelf for the purpose of finding useful mineral resources." He pointed out that there was included in the proposal the condition that research results must be published. The Danish proposal, he explained, was broad enough to include the possibility of pri-

⁹³ Final Act, A/CONF.13/L.58; *ibid.*/L.55, pp. 2-3.

⁹⁴ ILC Report, 8th Sess., 1956, *loc. cit.*, p. 43.

⁹⁵ A/CONF.13/C.4/L.49. Initially Denmark proposed, in connection with Art. 68, that there be added a new paragraph reading:

"Notwithstanding the preceding paragraph, the coastal State may not interfere with fundamental research on the physical characteristics, geology and biology of the seabed and subsoil of the continental shelf outside the territorial sea, provided that such research is carried out with the intention of giving due publicity to the results obtained, and that an opportunity is afforded the coastal State to follow the investigations through qualified observers." (A/CONF.13/C.4/L.10.)

Denmark subsequently withdrew this text and proposed instead, in connection with Art. 71, the text set forth above.

⁹⁶ As distinguished from that in *ibid.*/L.10.

vate individuals engaging in fundamental research on the continental shelf.⁹⁷ The Danish proposal was adopted by 25 votes in favor, 20 against, and 10 (U. S.) abstentions.⁹⁸

As to paragraph 2, it will be recalled that the corresponding paragraph of Article 71 of the ILC draft read:

Subject to the provisions of paragraphs 1 and 5 of this article, the coastal State is entitled to construct and maintain on the continental shelf installations necessary for the exploration and exploitation of its natural resources, and to establish safety zones at a reasonable distance around such installations and take in those zones measures necessary for their protection.⁹⁹

The words "or operate . . . installations and other devices," now included in paragraph 2, had their origin in language proposed by Admiral Mouton of The Netherlands.¹⁰⁰

Paragraph 3 of Article 5 had its origin in a Yugoslav proposal which read:

1. After paragraph 2 of Article 71 add a new paragraph 3 as follows:

"3. The safety zones referred to in paragraph 2 of the present article have a perimeter [replaced by "shall extend to a distance"] of 500 metres around the installations which have been erected, counting from each point of the outer edge of such installations. The air safety zone above that area shall extend up to a height of 1,000 metres, counting from the highest point of such installations. Ships and aircraft of all nationalities must respect these safety zones."¹⁰¹

Only the first and third sentences were adopted by Committee IV.¹⁰² Miss Gutteridge of the United Kingdom stated that her delegation voted for the first sentence of paragraph 1 of the Yugoslav amendment on the understanding that 500 meters "was the maximum extent of the safety zone and not a fixed distance."¹⁰³

Paragraph 4 reads precisely as did paragraph 3 of the ILC text, except for the addition of the words "and devices" inserted as a drafting change in order that this paragraph would conform with the language of the two preceding paragraphs.¹⁰⁴

⁹⁷ A/CONF.13/C.4/SR. 28, pp. 4-5.

⁹⁸ A/CONF.13/C.4/SR.30, p. 9. Art. 71, par. 1, as amended by Denmark, was adopted by 41 (U.S.) votes in favor, to none against, with 8 abstentions. *Ibid.*, p. 10.

⁹⁹ ILC Report, 8th Sess., 1956, *loc. cit.*, p. 43.

¹⁰⁰ A/CONF.13/C.4/L.22. This proposal was adopted by 25 (U.S.) votes in favor, to 12 against, with 17 abstentions (A/CONF.13/C.4/SR.30, p. 8). See also *ibid.*, p. 2.

¹⁰¹ A/CONF.13/C.4/L.15; A/CONF.13/C.4/SR.30, p. 2.

¹⁰² The first sentence was adopted by 18 votes in favor, to 14 (U. S.) against, with 23 abstentions (A/CONF. 13/C.4/SR.30, p. 8). The second sentence was rejected by 17 votes in favor, 18 (U. S.) against, with 21 abstentions (*ibid.*) The words "and aircraft" were then logically dropped. The third sentence was adopted by 31 votes in favor, 5 against, and 19 (U. S.) abstentions (*ibid.*).

¹⁰³ A/CONF.13/C.4/SR.30, p. 8.

¹⁰⁴ ILC Report, 8th Sess., 1956, *loc. cit.*, p. 43; A/CONF.13/C.4/L.65, p. 2 (text submitted by Drafting Group).

Paragraph 5 had its origin, in considerable measure, in paragraph 4 of the ILC draft, reading:

4. Due notice must be given of any such installations constructed, and permanent means for giving warning of their presence must be maintained.¹⁰⁵

The United Kingdom proposed that the above-quoted paragraph of the ILC text be replaced by the following text:

Due notice of any such installation constructed should be given to all Governments with offices which issue notices to mariners, and permanent means for giving warning of their presence must be maintained.¹⁰⁶

This proposal was adopted by 20 (U. S.) votes in favor, to 14 against, with 18 abstentions.¹⁰⁷

A proposal put forward by Pakistan also read:

Prior notice must be given of the construction of any such installations to all governments and groups interested in navigation and fishing, and when constructed permanent means for giving warning of their presence must be maintained. Any installations which are abandoned or disused must be entirely removed.¹⁰⁸

This proposal was adopted by Committee IV by a vote of 23 in favor, to 13 (U. S.) against, with 19 abstentions.¹⁰⁹

The United Kingdom proposal, thus adopted, became paragraph 5 of the text as approved by Committee IV; while the Pakistan text, thus adopted, became paragraph 6 of the article as amended and contained in the Report of the Fourth Committee, April 19, 1958.¹¹⁰

At the next to the last meeting of Committee IV,¹¹¹ during the consideration of the Drafting Group's Report,¹¹² Miss Gutteridge of the United Kingdom proposed that the Committee re-open its discussion on the substance of paragraphs 5 and 6 of the text of Article 71, in view of the comments on those paragraphs in the Drafting Group's Report.¹¹³ The proposal was adopted. Following a rather lively discussion of the Committee's earlier decisions on these paragraphs, Mr. Wershof of Canada proposed a single paragraph to replace paragraphs 5 and 6 of the text adopted at the 30th Meeting, reading:

Due notice must be given of the construction of any such installations, and permanent means for giving warning of their presence must be maintained. Any installations which are abandoned or disused must be entirely removed.¹¹⁴

This text was strongly supported by India and also by the United States representative in Committee IV, the latter stating that it "would be impossible to lay down at the present meeting precisely how, when and to

¹⁰⁵ ILC Report, 8th Sess., 1956, *loc. cit.*

¹⁰⁷ A/CONF.13/C.4/SR.30, p. 9.

¹⁰⁹ A/CONF.13/C.4/SR.30, p. 9.

¹¹¹ A/CONF.13/C.4/SR.41, p. 4.

¹¹³ A/CONF.13/C.4/L.65, p. 2.

¹⁰⁶ A/CONF.13/C.4/L.28.

¹⁰⁸ A/CONF.13/C.4/L.48.

¹¹⁰ A/CONF.13/L.12, pp. 7, 11.

¹¹² A/CONF.13/C.4/L.63 and L.65.

¹¹⁴ A/CONF.13/C.4/SR.41, pp. 5-6.

whom the notice should be given.”¹¹⁵ The Canadian proposal was adopted by 25(U. S.) votes in favor, 1 opposed, with 14 abstentions.¹¹⁶

Paragraph 6 of the article had its origin largely in paragraph 5 of the ILC text which read:

Neither the installations themselves, nor the said safety zones around them may be established in narrow channels or where interference may be caused in recognized sea lanes essential to international navigation.¹¹⁷

An amendment proposed by Venezuela to delete the phrase “in narrow channels or” in the above-quoted ILC text was adopted.¹¹⁸

Paragraph 7 of the article, as to the taking of all appropriate measures for protection of the living resources of the sea from harmful agents, had its origin in a Yugoslav proposal.¹¹⁹ It was approved in Committee by the large vote of 38(U. S.) in favor, 2 opposed, and 12 abstentions.¹²⁰

Paragraph 8 had its origin in a text having to do with “any research into the soil or subsoil of the continental shelf” proposed by France.¹²¹ On April 21, 1958, the Drafting Committee of the Conference, in considering the articles, decided to replace the words just quoted by the following words: “concerning the continental shelf and undertaken there.”¹²²

At the 9th Plenary Session of the Conference, Mr. Jhirad of India (India's representative in Committee IV) requested a separate vote on the words in paragraph 1 of Article 71 reading: “nor [result] in any interference with fundamental oceanographic or other scientific research carried out with

¹¹⁵ *Ibid.*, p. 6.

¹¹⁶ *Ibid.*

¹¹⁷ ILC Report, 8th Sess., 1956, *loc. cit.*, p. 43.

¹¹⁸ A/CONF.13/C.4/L.35 The amendment was adopted by a vote of 23 in favor, 19 (U. S.) against, with 11 abstentions (A/CONF.13/C.4/SR.30, p. 9).

¹¹⁹ A/CONF.13/C.4/L.15.

¹²⁰ A/CONF.13/C.4/SR.30, p. 10.

¹²¹ A/CONF.13/C.4/L.56. The text was adopted by 30(U.S.) votes in favor, 17 against, with 6 abstentions (A/CONF.13/C.4/SR.30, p. 9).

¹²² First Report of the Drafting Committee (A/CONF.13/L.13, p. 2). A Bulgarian proposal would have added the following new paragraph to Art. 71:

“The coastal State shall not use the continental shelf for the purpose of building military bases or installations.” (A/CONF.13/C.4/L.41/Rev.1.)

During the course of the discussions, India proposed the following modification to the Bulgarian proposal:

“The coastal State shall have the right and the obligation to prevent the continental shelf from being used for the purpose of building military bases or installations.” (A/CONF.13/C.4/SR.28, p. 8.)

India on the same day formally proposed, instead, to add a new paragraph to Art. 71, to read:

“The continental shelf adjacent to any coastal State shall not be used by the coastal State or any other State for the purpose of building military bases or installations.” (A/CONF.13/C.4/L.57.)

Thereupon Bulgaria withdrew her proposal in favor of the latter Indian proposal (A/CONF.13/C.4/SR.29, pp. 2, 6). The Indian proposal on roll-call vote was rejected by 31(U. S.) votes against, to 18 in favor, with 6 abstentions (*ibid.*/SR.30, p. 10.). A Bulgarian proposal prohibiting use of the continental shelf for the purpose of building military bases or any installations directed against other states, had also been introduced and later dropped in connection with Art. 69 of the ILC draft (A/CONF.13/C.4/L.41). See note 67 above.

the intention of open publication.”¹²³ He was of the view that oceanographic research did not form part of the problem of the continental shelf, and in particular he doubted whether the words “in any interference” should be used in view of the words “any unjustifiable interference” in the first part of the paragraph.¹²⁴ The Chairman, Prince Wan of Thailand, put these words to the vote separately, with the result that they were adopted by 44(U. S.) votes in favor, 10 against, and 8 abstentions.¹²⁵

Paragraph 8 was also put to the vote separately in Plenary, at the instance of Mr. Stabel of Norway,¹²⁶ supported by Professor Tunkin of the U.S.S.R.¹²⁷ The latter supported the request of Norway

. . . because, if no kind of scientific research into the continental shelf could be undertaken without the consent of the coastal State, much valuable purely scientific work would be stopped. The preceding clauses sufficiently safeguarded the interests of the coastal State. The inclusion of the paragraph in the Convention might dissuade some States from becoming parties.¹²⁸

Paragraph 8, with the changes recommended by the Drafting Committee, was adopted in Plenary Session by 43(U. S.) votes in favor, 15 against, and 5 abstentions.¹²⁹

The whole of Article 71, was adopted in Plenary Session by 50(U. S.) votes in favor, none opposed, and 14 abstentions.¹³⁰

ARTICLE 6

(based on Article 72, ILC draft)

Article 6 of the Convention reads:

1. Where the same continental shelf is adjacent to the territories of two or more States whose coasts are opposite each other, the boundary of the continental shelf appertaining to such States shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line, every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.

2. Where the same continental shelf is adjacent to the territories of two adjacent States, the boundary of the continental shelf shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary shall be determined by application of the principle of equidistance from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.

3. In delimiting the boundaries of the continental shelf, any lines which are drawn in accordance with the principles set out in paragraphs 1 and 2 of this article should be defined with reference to charts and geographical features as they exist at a particular date, and refer-

¹²³ A/CONF.13/SR.9, p. 2.

¹²⁶ *Ibid.*

¹²⁷ *Ibid.*

¹²⁹ *Ibid.*

¹²⁴ *Ibid.*

¹²⁶ *Ibid.*

¹²⁸ *Ibid.*

¹³⁰ *Ibid.*

once should be made to fixed permanent identifiable points on the land.¹³¹

¹³¹ Final Act, A/CONF.13/L.58; *ibid.*/L.55, p. 3.

It will be recalled that at the invitation of Professor François, Special Rapporteur of the ILC on the "Regime of the Territorial Sea," technical experts were invited to examine, in their personal capacity, certain questions of a technical nature raised during the discussion in the ILC of the subject of boundaries. Accordingly, Professor L. E. G. Asplund, Geographic Survey Department, Stockholm; Mr. S. Whittetole-Beggs, Special Adviser on Geography, Department of State, Washington, D. C.; M. P. R. V. Couillault, Ingénieur en Chef du Service Central Hydrographique, Paris; Commander R. H. Kennedy (Retd.), Hydrographic Department, Admiralty, London, accompanied by Mr. R. C. Shawyer, Administrative Officer, Admiralty, London; and Vice Admiral A. S. Pinke (Retd.), Royal Netherlands Navy, The Hague, met at The Hague from April 14 to 16, 1953, to consider these matters.

A questionnaire, drawn up by the Special Rapporteur, was submitted to the Committee of Experts, whose report was drafted by Mr. C. W. van Santen, assistant juridical counsel of the Netherlands Minister of Foreign Affairs (A/CN.4/61, Add. 1, May 18, 1953). Question VI read:

"How should the international boundary be drawn between two countries, the coasts of which are opposite each other at a distance of less than 2 T miles? To what extent have islands and shallow waters to be accounted for?"

To this, the Committee of Experts replied:

"An international boundary between countries the coasts of which are opposite each other at a distance of less than 2 T miles should as a general rule be the median line, every point of which is equidistant from the base-lines of the States concerned. Unless otherwise agreed between the adjacent States, all islands should be taken into consideration in drawing the median line. Likewise, drying rocks and shoals within T miles of only one State should be taken into account, but similar elevations of undetermined sovereignty, that are within T miles of both States, should be disregarded in laying down the median line. There may, however, be special reasons, such as navigation and fishing rights, which may divert the boundary from the median line. The line should be laid down on charts of the largest scale available, especially if any part of the bed of water is narrow and relatively tortuous." (*Ibid.*, Annex, p. 6.)

Question VII submitted to the Committee of Experts read:

"How should the (lateral) boundary line be drawn through the adjoining territorial sea of two adjacent States? Should this be done

"A. by continuing the land frontier?

"B. by a perpendicular line on the coast at the intersection of the land frontier and the coastline?

"C. by a line drawn vertically on the general direction of the coastline?

"D. by a median line? If so, how should this line be drawn? To what extent should islands, shallow waters and navigation channels be accounted for?"

The Committee of Experts replied:

"1. After thoroughly discussing different methods the Committee decided that the (lateral) boundary through the territorial sea—if not already fixed otherwise—should be drawn according to the principle of equidistance from the respective coastlines.

"2. In a number of cases this may not lead to an equitable solution, which should be then arrived at by negotiation." (A/CN.4/61/Add. 1, May 18, 1953, Annex, pp. 6-7.)

Finally, the Committee of Experts also made the following further "REMARK REGARDING THE ANSWERS TO VI AND VII":

The basic premises on which paragraphs 1 and 2 of this article are based are parallel: Paragraph 1 has to do with situations where two states are opposite each other, separated by an expanse of continental shelf, while paragraph 2 has to do with situations where two states are adjacent, with the continental shelf common to both along the littoral. Under each of these paragraphs, provision is made for the states concerned to come to agreement over the boundary with respect to the continental shelf adjacent to their coasts. Also, under each of these paragraphs, there is provision—in the absence of such agreement and unless another boundary is justified by special circumstances—for the construction of a boundary based upon the principle of “equidistance.” In the case of opposite coasts, the constructed boundary is to be a median line, that is, a line drawn between the states in such a way that every point along it is equidistant from the nearest point of the coasts (as expressed by “the baselines from which the breadth of the territorial sea of each state is measured”) of the two states. In the case of adjacent coasts the constructed boundary is to be a lateral¹³² line, that is, a line extending seaward from the states in such a way that every point along it is equidistant from the nearest points of the coasts (as expressed by “the baselines from which the breadth of the territorial sea of each country is measured”) of the two states.

During the course of the 32nd Meeting of Committee IV, Commander

“The Committee considered it important to find a formula for drawing the international boundaries in the territorial waters of States, which could also be used for the delimitation of the respective continental shelves of two States bordering the same continental shelf.” (*Ibid.*, p. 7.)

Accordingly, Art. 6 (formerly Art. 72 of the ILC draft), pars. 1 and 2, is in harmony with the Report of the Committee of Experts.

In this connection, see Arts. 12 and 14 of the ILC draft relating to delimitation of the Territorial Sea (ILC Report, 8th Sess., 1956, *loc. cit.*, pp. 17 and 18). Art. 12 of the Convention on the Territorial Sea and the Contiguous Zone, also approved at the Geneva Conference on the Law of the Sea (Final Act, A/CONF.13/L.58; *ibid.*/L.52, p. 5) reads:

“1. Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. The provisions of this paragraph shall not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance with this provision.

“2. The line of delimitation between the territorial seas of two States lying opposite to each other or adjacent to each other shall be marked on large-scale charts officially recognized by the coastal States.”

¹³² Par. 1 describes the boundary of the continental shelf between states whose coasts are opposite each other, in absence of agreement or special circumstances, as a “median” line. Par. 2 does not assign a name to the line described therein. In the case of the line under par. 2, it is a lateral line, that is, a line extending seaward from the baselines of adjacent states, while in the case of the line to be established under par. 1, it is to be a “median” line, that is, a line drawn between the states in such a way that every point along it is equidistant from the nearest points of the baselines of the two states.

R. H. Kennedy, British Hydrographer and member of the United Kingdom Delegation, discussed, with the aid of a blackboard, the several suggested methods of marking boundaries with respect to the continental shelf, namely: the seaward extension of the land boundary; a line perpendicular to the general direction of the coast; a line based upon a parallel of latitude or a meridian of longitude; and a boundary line equidistant from selected points. In summary, he stated:

... sea boundaries established by projection of a land boundary, by projection of a parallel of latitude or meridian, or by intersection of the radii of two fixed points on the coastline of States which were adjacent or opposite to each other were not satisfactory in many cases. Such boundaries often did not result in a fair apportionment of the sea area between the two States concerned, and might, indeed, cut across land territory. Similarly, the line of deepest water was not, he thought, a satisfactory criterion for establishing a boundary; in the presence of a number of pools of varying depth it would be difficult to establish the exact position of such a line. The fairest method of establishing a sea boundary was that of the median line every point of which was equidistant from the nearest points of the base lines from which the breadth of the territorial sea was measured, as stated in the United Kingdom proposal (A/CONF.13/C.4/L.28). When properly drawn, the median line was a precise line consisting of a series of short straight lines. In agreeing upon a boundary, adjacent or opposite States might well decide to straighten that series of lines so as to avoid an excessive number of angles or "dog-legs," giving an equal sea area to each State and also taking into account any special circumstances. It had been suggested at a previous meeting that the high water line might be a more satisfactory criterion; he pointed out, however, that while the high water line did not move as rapidly as the low water line, it was nevertheless liable to move, and in certain places it had moved out to seaward by several miles in the course of fifty years.

Among the special circumstances which might exist there was, for example, the presence of a small or large island in the area to be apportioned; he suggested that, for the purposes of drawing a boundary, islands should be treated on their merits, very small islands or sand banks being considered as having no continental shelf but only an appropriate territorial sea. Other types of special circumstances were the possession by one of the two States concerned of special mineral exploitation rights or fishery rights, or the presence of a navigable channel; in all such cases, a deviation from the median line would be justified, but the median line would still provide the best starting point for negotiations.¹³³

Save for slight drafting changes, the only changes made by Committee IV in paragraphs 1 and 2 of Article 72 of the text approved by the International Law Commission in 1956,¹³⁴ were the insertion of the words "nearest points of the" in the clause "equidistant from the baselines" (so that the text would read "equidistant from the nearest points of the base

¹³³ A/CONF.13/C.4/SR.32, p. 2. See also the paper prepared by Commander Kennedy entitled "Brief Remarks on Median Lines and Lines of Equidistance, and on the Methods Used in Their Construction," distributed at the Conference by the Delegation of the United Kingdom, April 2, 1958.

¹³⁴ ILC Report, 8th Sess., 1956, *loc. cit.*, p. 44.

lines'') in each of these paragraphs. These changes were the result of proposals initially made by the United Kingdom,¹³⁵ and subsequently presented as a joint amendment by the United Kingdom and The Netherlands.¹³⁶ A Venezuelan proposal that the boundaries in the circumstances referred to in the two paragraphs should be determined by agreement or by other means recognized in international law,¹³⁷ was defeated by 5 votes in favor, 32(U. S.) against, and 19 abstentions.¹³⁸

A Yugoslav proposal to delete, in both paragraphs of Article 72, the words "and unless another boundary line is justified by special circumstances"¹³⁹ was defeated by 39(U. S.) votes against, 9 for, with 8 abstentions.¹⁴⁰

An Italian proposal to amend paragraph 1 would have provided:

Where in the proximity of coasts which are opposite to each other there are islands belonging to the said continuous continental shelf, in the absence of agreement, the boundary is the median line every point of which is equidistant from the low water line along the coast of the said States, unless some other method of drawing the said median line is justified by special circumstances.¹⁴¹

The proposal was rejected.¹⁴²

A proposal to add to paragraph 1, put forward by Iran, read:

Where special circumstances, as envisaged in this paragraph so warrant, the median line may be measured from the high water mark along the coastline of the countries concerned.¹⁴³

This proposal was also defeated.¹⁴⁴

Paragraph 1 of the article was approved by 38(U. S.) votes in favor, 2 against, and 16 abstentions.¹⁴⁵ Paragraph 2 of the article was approved by 39(U. S.) votes in favor, 2 against, and 15 abstentions.¹⁴⁶

Paragraph 3 of the article also had its origin in a proposal initially put forward by the United Kingdom,¹⁴⁷ and subsequently taken over by The Netherlands and jointly proposed by those two countries.¹⁴⁸

Initially, the United Kingdom text had read ". . . any lines which are drawn . . . *shall be* defined with reference to charts and to geographical features . . . and reference *shall be* made to fixed permanent identifiable

¹³⁵ A/CONF.13/C.4/L.28, and /L.28/Rev. 1.

¹³⁶ A/CONF.13/C.4/L.23; A/CONF.13/C.4/SR.33, p. 6. The vote on the U.K.-Netherlands joint amendment (after the deletion of "or other submarine areas"), was 29(U. S.) in favor, 17 against, and 8 abstentions (par. 1); and 29(U. S.) votes in favor, 16 against, and 9 abstentions (par. 2). *Ibid.*, pp. 6-7.

¹³⁷ A/CONF.13/C.4/L.42.

¹³⁸ A/CONF.13/C.4/SR.33, p. 6.

¹³⁹ A/CONF.13/C.4/L.16 and/Add.1.

¹⁴⁰ A/CONF.13/C.4/SR.33, p. 6.

¹⁴¹ A/CONF.13/C.4/L.25/Rev.1.

¹⁴² This proposal was rejected by 3 votes in favor, 31(U.S.) against, and 18 abstentions. A/CONF.13/C.4/SR.33, p. 6.

¹⁴³ A/CONF.13/C.4/L.60.

¹⁴⁴ A/CONF.13/C.4/SR.33, p. 6. The vote was 6 in favor, 27(U.S.) against, and 21 abstentions.

¹⁴⁵ *Ibid.*, p. 7.

¹⁴⁶ *Ibid.*, p. 8.

¹⁴⁷ A/CONF.13/C.4/L.28 and L.28/Rev. 1.

¹⁴⁸ A/CONF.13/C.4/SR.33, p. 6.

points on the land.”¹⁴⁹ At the instance of the United States representative,¹⁵⁰ the verb “shall be” was changed to “should be” in the revised text of the paragraph put forward by the United Kingdom,¹⁵¹ and subsequently espoused by both the United Kingdom and The Netherlands.¹⁵² While the United States agreed as to the wisdom of the third paragraph as proposed, the United States representative did not feel that states should be bound in advance to reach agreement in a particular way.¹⁵³ Paragraph 3 of the article was approved by 32 (U. S.) votes in favor, 16 opposed, and 6 abstentions.¹⁵⁴

Finally, there was an Iranian proposal to add a new paragraph, reading:

Where an island or islands exist in a region which constitutes a continuous continental shelf, the boundary shall be the median line and shall be measured from the low water mark along the coasts of the countries concerned, provided, however, that where special circumstances so warrant, the median line shall be measured from the high water mark along the coastline of the countries concerned.¹⁵⁵

When this proposal was defeated,¹⁵⁶ the Iranian representative (Mr. Rouhani) stated that the acceptance of the principle of the median line as defined in Article 72, could in no case infringe the sovereign rights of his country over any island situated on a median line which might be established in the Persian Gulf.¹⁵⁷

Professor Münch of the Federal Republic of Germany stated, with reference to paragraphs 1 and 2 of the article, that his government accepted the text approved by the majority of the Committee, subject to an interpretation of the words “special circumstances” as meaning that any exceptional delimitation of territorial waters would affect the delimitation of the continental shelf.¹⁵⁸

The entire text of Article 72 was approved in Committee IV by 36 (U. S.) votes in favor, none against, and 19 abstentions.¹⁵⁹

When Article 72 came before the Plenary Session of the Conference,¹⁶⁰ Mr. Baroš of Yugoslavia proposed deletion from the text of the words “and unless another boundary line is justified by special circumstances,”¹⁶¹ as not justified in any manual on international law. The Iranian Delegation (Mr. Matine-Daftary) supported retention of the words, stating that “Every law which was too strictly worded was inevitably broken,” and that there was no mention of the clause in international law manuals “because the continental shelf was a new subject.”¹⁶² Save for Spanish language changes recommended by the Drafting Committee, Article 72 was

¹⁴⁹ A/CONF.13/C.4/L.28.

¹⁵¹ A/CONF.13/C.4/L.28/Rev. 1.

¹⁵² A/CONF.13/C.4/SR.32, p. 8.

¹⁵³ A/CONF.13/C.4/L.60.

¹⁵⁶ A/CONF.13/C.4/SR.33, p. 7. The vote was 2 votes in favor, 33 (U. S.) against and 21 abstentions.

¹⁵⁷ *Ibid.*, p. 8.

¹⁵⁹ *Ibid.*

¹⁶¹ A/CONF.13/L.15.

¹⁵⁰ A/CONF.13/C.4/SR.32, p. 8.

¹⁵² A/CONF.13/C.4/SR.33, p. 6.

¹⁵⁴ A/CONF.13/C.4/SR.33, p. 7.

¹⁵⁸ *Ibid.*

¹⁶⁰ A/CONF.13/SR.9, p. 3.

¹⁶² A/CONF.13/SR. 9, p. 3.

adopted without change in Plenary by 63(U. S.) votes in favor, none against, and 2 abstentions.¹⁶³

ARTICLE 7

(new article)

This article of the Convention reads:

The provisions of these articles shall not prejudice the right of the coastal state to exploit the subsoil by means of tunnelling irrespective of the depth of water above the subsoil.¹⁶⁴

The article had its origin in a proposal, almost identically worded, put forward by the United Kingdom in connection with Article 2 of the Convention (Article 68 of the ILC draft).¹⁶⁵ The Drafting Group of Committee IV included the provision as a separate article (Article 73).¹⁶⁶ In Plenary Session of the Conference the article was adopted, with changes in the French and Spanish texts recommended by the main Drafting Committee,¹⁶⁷ by 62(U. S.) votes to none, with 4 abstentions.¹⁶⁸

"DISPUTES" PROVISION

Apart from the substantive articles of the Convention adopted, certain other important matters came before Committee IV and the subsequent plenary sessions of the Conference that considered its work, among which was the matter of whether there should be a "disputes" article relating to the articles treating of the continental shelf, as recommended by the International Law Commission in its 1956 text. Article 73 of the ILC text read:

Any disputes that may arise between States concerning the interpretation or application of articles 67-72 shall be submitted to the International Court of Justice at the request of any of the parties, unless they agree on another method of peaceful settlement.¹⁶⁹

Additional proposals in the matter before Committee IV were: an Argentine proposal to replace Article 73 by an article providing for settlement of disputes "in accordance with the principles of the Charter of the United Nations";¹⁷⁰ a U.S.S.R. proposal, subsequently withdrawn and then espoused by Venezuela, to delete the words "at the request of any of the

¹⁶³ *Ibid.*

¹⁶⁴ Final Act, A/CONF.13/L.58; *ibid.*/L.55, p. 4.

¹⁶⁵ A/CONF.13/C.4/L.44. The proposal as put forward by the U.K. began with the words: "The provisions of paragraph 1 of this Article shall not prejudice . . ." Prior to the vote on this proposal in Committee IV, Mr. Jhirad of India proposed that the paragraph should begin with the words: "The provisions of these articles shall not prejudice . . ." The United Kingdom representative accepted the proposal. The vote on the proposal as amended was 25 votes (U.S.) in favor, 19 against, and 23 abstentions (A/CONF.13/C.4/SR. 24, p. 8).

¹⁶⁶ A/CONF.13/C.4/L.65, p. 3; A/CONF.13/C.4/SR.41, p. 7.

¹⁶⁷ A/CONF.13/L.13; A/CONF.13/L.12, Annex II, p. 3.

¹⁶⁸ A/CONF.13/SR.9, p. 3.

¹⁶⁹ ILC Report, 8th Sess., 1956, *loc. cit.*, pp. 44-45.

¹⁷⁰ A/CONF.13/C.4/L.51; A/CONF.13/C.4/SR.35, p. 8.

parties" and replace them by the words "in accordance with the statute of the Court,"¹⁷¹ thus eliminating the compulsory aspect of the ILC text; two Netherlands proposals, one, to replace the ILC text by providing that disputes concerning Articles 67-72 might, unless another method of settlement was agreed upon, be submitted to the International Court of Justice by "unilateral application" of any of the parties, thus conforming to the wording of the Statute of the Court; and second, a proposal that in the case of disputes relating to Article 72, the International Court of Justice should have power to decide *ex aequo et bono* whether a boundary line other than that defined in that article was justified by special circumstances;¹⁷² and an Indian proposal to add a proviso to the ILC text to retain in full vigor exceptions made to the competence of the Court in declarations under Article 36 of the Statute of the Court.¹⁷³ Each of these proposals was in turn defeated in Committee IV, leaving the ILC text to be voted upon, which was accepted at the 35th Meeting of the Committee, on April 10, 1958, by 33 (U. S.) votes in favor, to 15 against, with 14 abstentions.¹⁷⁴ The United States supported the ILC draft.¹⁷⁵ That text provided that disputes should be submitted to the International Court of Justice only if other methods of peaceful settlement were not previously agreed upon, and did not therefore exclude such methods. The United States, however, saw no need for a provision to the effect that parties to a dispute should accept a settlement in accordance with the procedures or principles of the United Nations Charter, or which reiterated the provisions of the Statute of the Court. States, for the most part, would already be so obligated to resort to peaceful procedures, and might resort to the International Court of Justice in conformity with the Statute of the Court.

In Plenary Session, it developed that there was considerable sentiment against including a "disputes" provision in the Convention on the Continental Shelf.¹⁷⁶ Instead, the Conference, at the 17th Plenary Session, adopted an "Optional Protocol of Signature Concerning the Compulsory Settlement of Disputes,"¹⁷⁷ applicable to "Disputes arising out of the interpretation or application of any Convention on the Law of the Sea," save

¹⁷¹ A/CONF.13/C.4/L.59; A/CONF.13/C.4/SR.35, p. 11.

¹⁷² A/CONF.13/C.4/L.62.

¹⁷³ A/CONF.13/C.4/L.61.

¹⁷⁴ A/CONF.13/C.4/SR.35, p. 11. The Argentine amendment was rejected by 30 (U.S.) votes to 25, with 5 abstentions. The Venezuelan (original U.S.S.R. proposal) amendment was rejected by 29 (U.S.) votes to 26, with 6 abstentions. The Netherlands' first proposal was rejected by 29 (U.S.) votes to 25, with 7 abstentions. The Netherlands' second proposal was rejected by 44 (U.S.) votes to 3, with 13 abstentions. The Indian amendment was rejected by 25 (U.S.) votes to 11, with 25 abstentions. *Ibid.* For the vote on the ILC text, see *ibid.*, p. 12.

¹⁷⁵ A/CONF.13/C.4/SR.34, pp. 5-6.

¹⁷⁶ A/CONF.13/SR.9, pp. 3-4. See also A/CONF.13/SR.13.

¹⁷⁷ The separate Protocol had its origin in Swiss initiative, presented in the form of a letter to the President of the Conference (A/CONF.13/BUR/L.3; A/CONF.13/L.40). The Optional Protocol of Signature, as amended, was adopted on April 26, 1958, by 52 (U.S.) votes in favor, none opposed, and 13 abstentions (A/CONF.13/SR.17, p. 12). For the text of the Protocol as adopted, see Final Act, A/CONF.13/L.58, *ibid.*/L.57, reprinted below, p. 862.

disputes with reference to certain articles of the Convention on Fishing and Conservation of Living Resources of the High Seas, as to which that Convention contains its own specific procedures.¹⁷⁸ Accordingly, a "disputes" clause was not included in the Convention on the Continental Shelf.¹⁷⁹

SEPARATE CONVENTION

During the course of the discussions in Committee IV the matter of the form in which the final instrument emanating from the Committee's work should be cast remained undecided. Dr. Garcia Amador of Cuba, member of the International Law Commission, suggested that Committee IV consider embodying the articles in a draft declaration which states would not be expected to ratify formally.¹⁸⁰ The suggestion did not find favor. Certain other representatives favored inclusion of the articles pertaining to the continental shelf with articles evolved on other aspects of the law of the sea by other committees of the Conference, apparently in a single document.¹⁸¹ It appeared that the latter were not too clear among themselves as to the scope of the convention envisaged, and a text of such a multifarious convention was never circulated either in skeleton form or in draft. This may have been the result, in part, of the fact that Committee IV concluded its work ahead of the other committees, and that at the time that its recommendation was made to the Conference as to the form of its work, other committees had not completed consideration of the articles before them and had not come to grips with the form in which their respective agreed texts should be cast. At the close of its work, Committee IV adopted a Canadian proposal (as amended by the U.S.S.R.) stating that Committee IV recommended to the Conference that the results of its work be embodied in a convention relating to the continental shelf.¹⁸²

The matter of the form of the instrument was finally decided in Plenary Session of the Conference on April 22, 1958, at the outset of conference consideration of the work of Committee IV.¹⁸³ At that point, Mr. Jhirad of India proposed that the Conference should first decide to incorporate the articles on the continental shelf, "which was an entirely new concept," in a separate convention.¹⁸⁴ He was promptly supported in his proposal by Sir Reginald Manningham-Buller (U.K.), Professor Tunkin (U.S.S.R.),

¹⁷⁸ For the text, as adopted by the Conference, of the Convention on Fishing and Conservation of the Living Resources of the High Seas, considered by Committee III, see Final Act, A/CONF.13/L.58, *ibid.*/L.54, below, p. 851. The substantive articles of that Convention referred to in the Optional Protocol are Arts. 4-8, while the procedural articles are Arts. 9-12 of that Convention.

¹⁷⁹ On April 26, 1958, at the 17th Plenary Session, following the adoption of the Optional Protocol of Signature Concerning the Compulsory Settlement of Disputes, Art. 74 was finally put to the vote of the Conference, in order to remove all doubts as to its status, with the result that it failed to receive the required two-thirds majority, the vote being 38 votes in favor, 20 against, and 7 abstentions (U.S.) (A/CONF.13/SR.17, p. 12).

¹⁸⁰ A/CONF.13/C.4/SR.36, p. 3.

¹⁸¹ See A/CONF.13/C.4/SR.37 and 38.

¹⁸² A/CONF.13/C.4/SR.38, pp. 2, 6-7. The vote was 39 (U.S.) in favor, and 6 against, and 7 abstentions.

¹⁸³ A/CONF.13/SR.8, p. 5.

¹⁸⁴ *Ibid.*, p. 2.

and Miss Whiteman (U.S.A.), and others.¹⁸⁵ Representatives of France, Chile, Yugoslavia, Italy, Venezuela and others opposed the Indian proposal.¹⁸⁶ The Conference decided by a vote of 57(U. S.) in favor, 11 against and 12 abstentions, to include the articles on the continental shelf in a separate convention.¹⁸⁷

Surprisingly, the writer gained the impression that representatives of some countries seemed to be under an impression that the United States had to have the Convention on the Continental Shelf, and that by holding off on their assent to a separate convention with reference to the shelf something was to be gained from the United States, by way of trading with reference to points still remaining undecided in other committees. This view, if it existed, was unfounded. The United States Delegation did not go to the Conference with the intention of sacrificing points of importance on aspects of the law of the sea considered in other committees of the Conference in order that there should be a Convention on the Continental Shelf.

RESERVATIONS

Another controversial matter before Committee IV and subsequently, in the Plenary Session, was that of whether reservations should be permitted to the articles on the continental shelf, and, if so, whether they should be limited.

After considering a list of examples of so-called "final clauses" appearing in various treaties and conventions, supplied by the United Nations Secretariat,¹⁸⁸ Committee IV decided to follow an article permitting reservations to all except certain articles to be enumerated. For this purpose, the Committee voted separately on each article that it had approved, with the result that it voted that each article from 67 through 74 should be included in the enumeration.¹⁸⁹ However, the Committee by the narrow vote of 20(U. S.) in favor, 21 against, and 20 abstentions, rejected the "reservations" clause as thus formulated when the article was put to the vote as a whole.¹⁹⁰

In the 13th Plenary Session, however, the Conference adopted a proposal put forward by Canada that reservations to Articles 67 to 69 should be prohibited.¹⁹¹ The United States supported the Canadian proposal, taking the view that reservations to certain articles would seriously undermine the Convention.¹⁹² However, at the 18th Plenary Session, at the instance of the U.S.S.R., a formula proposed as an alternative by the Drafting Committee of the Conference,¹⁹³ was approved by 43(U. S.) votes in favor, 5 against, and 19 abstentions.¹⁹⁴ Accordingly, Article 12, paragraph 1, of the Convention reads:

¹⁸⁵ *Ibid.*, pp. 2-5.

¹⁸⁶ *Ibid.*

¹⁸⁷ *Ibid.*, p. 5.

¹⁸⁸ A/CONF.13/L.7.

¹⁸⁹ A/CONF.13/C.4/SR.40, pp. 5-6.

¹⁹⁰ *Ibid.*, p. 6. The voting took place at a late night session amidst some confusion.

¹⁹¹ A/CONF.13/L.16. Subject to re-wording in the Drafting Committee the proposal was adopted by 40(U.S.) votes in favor, 4 against, and 19 abstentions (A/CONF.13/SR.9, p. (1)).

¹⁹² A/CONF.13/SR.9, p. 9.

¹⁹³ A/CONF.13/L.32, p. 2; A/CONF. 13/SR.18, p. 2.

¹⁹⁴ *Ibid.*, p. 3.

At the time of signature, ratification or accession, any state may make reservations to articles of the Convention other than to Articles 1 to 3 inclusive.¹⁹⁵

DENUNCIATION

Perhaps equally dangerous, from the standpoint of maintaining the essence of the text of the Convention, was the sentiment that appeared in Committee IV, and subsequently in Plenary Session, in favor of a provision to be included in the Convention permitting denunciation of its provisions. The matter of inclusion of a "denunciation" provision was rejected in Committee IV, at its 40th Meeting on April 17.¹⁹⁶ The United States strongly opposed the inclusion of such a provision as undesirable.¹⁹⁷ However, at the 41st Meeting, certain delegations questioned the wisdom of the rejection of the inclusion of a "denunciation" clause and it was concluded that the matter should be left to the Plenary Conference.¹⁹⁸

At the 9th Plenary Session of the Conference, this matter along with the subject of other final clauses was referred to the Drafting Committee of the Conference.¹⁹⁹ The Drafting Committee concluded that a denunciation clause was unnecessary.²⁰⁰ At the 18th Plenary Session, the Conference rejected a proposal put forward by Mexico (Dr. Gomez Robledo) to include a denunciation clause, by a vote of 12 votes in favor, 32 (U. S.) opposed, and 23 abstentions.²⁰¹

OTHER FINAL PROVISIONS

The Convention by its terms is open for signature until October 31, 1958,²⁰² and for accession,²⁰³ by all states Members of the United Nations or of any of the specialized agencies, and by any other state invited by the General Assembly to become a party to the Convention. It is to come into force on the 30th day following the date of deposit with the Secretary General of the United Nations of the twenty-second instrument of ratification or accession.²⁰⁴ At the end of five years following the entry into force of the Convention, request for revision of the Convention may be made by any Contracting Party by means of notification addressed to the Secretary General of the United Nations.²⁰⁵ The Secretary General has the duty of keeping states informed of signatures, ratifications, accessions, of the date on which the Convention comes into force, of requests for revision, and of reservations.²⁰⁶ The final article of the Convention provides that the original of the Convention, of which the Chinese, English, French, Russian

¹⁹⁵ A/CONF.13/L.55, p. 4.

¹⁹⁶ A/CONF.13/C.4/SR.40, pp. 8-9 (rejected by 5 votes in favor, 17 (U.S.) against, with 23 abstentions.)

¹⁹⁷ *Ibid.*, p. 8.

¹⁹⁸ A/CONF.13/C.4/SR.41, pp. 2-3; *ibid.*/SR.42, p. 2; A/CONF.13/L.12, p. 13.

¹⁹⁹ A/CONF.13/SR.9, pp. 12-14.

²⁰⁰ Sixth Report of Drafting Committee, A/CONF.13/L.32, p. 3.

²⁰¹ A/CONF.13/SR.18, pp. 3-6.

²⁰³ Art. 10.

²⁰² Art. 8.

²⁰⁴ Art. 11, par. 1.

²⁰⁵ Art. 13, par. 1. The U.N. General Assembly is to decide upon the steps, if any, to be taken on the request. Art. 13, par. 2.

²⁰⁶ Art. 14.

and Spanish texts are "equally authentic," shall be deposited with the Secretary General of the United Nations.²⁰⁷

ADOPTION OF THE CONVENTION

The Convention on the Continental Shelf was approved by the Conference in Plenary Session, April 26, 1958, by 57 votes in favor (including that of the United States), 3 votes opposed, and 8 abstentions.²⁰⁸ The three opposing votes were cast by Belgium, the Federal Republic of Germany, and Japan. The representatives of Belgium and the Federal Republic of Germany stated that they had voted against the Convention because they considered that the criterion of exploitability in Article 67 was incorrect and because they could not support the Convention without Article 74 ("disputes" clause).²⁰⁹ The representative of Japan stated that he voted against the Convention because reservations to Articles 67 and 68 were not admitted and because Article 74 had been rejected.²¹⁰

EVALUATION

It is probably yet too early to prophesy as to the probable extent of ratification of, or accession to, the Convention. Seventeen countries signed the Convention at Geneva, and nineteen other countries have signed subsequently.²¹¹

Suffice it to say, however, that regardless of the number of its ratifications and accessions, the Convention, together with the greatly similar 1956 International Law Commission draft on the same subject, will, in the future, doubtless have considerable influence on the content and direction of the developing international law with respect to the continental shelf. Thus, ratified or unratified, certain tendencies, generally recognized by states and set forth in the Convention, cannot fail to have a marked imprimatur on the course of development of international law concerning the continental shelf. Some may think that the Convention goes too far; others, perhaps a larger number, may think that it does not go far enough in certain of its aspects. Of course, whether it does or not is a matter of opinion; both views may be warranted in some measure. In any such assessment, it is to be borne in mind that the drafting in such a comparatively new field was difficult; that the Conference was tinged with politics; that the background of delegates was extremely variant; that in voting it was necessary to procure a majority of two-thirds in Plenary Session in order for the Conference to adopt a provision; and that, should it be desirable, any state party to the Convention may in future request revision of the Convention according to its terms.

²⁰⁷ Art. 15.

²⁰⁸ A/CONF.13/SR.18, p. 6.

²⁰⁹ *Ibid.*

²¹⁰ *Ibid.*

²¹¹ Information as of October 30, 1958. Countries signing at Geneva: Argentina, Canada, China, Colombia, Costa Rica, Cuba, Denmark, Dominican Republic, Ghana, Guatemala, Haiti, Iceland, Israel, Nepal, Thailand, Uruguay, and Yugoslavia. Subsequent signatories: Afghanistan, Australia, Bolivia, Ceylon, Finland, German Federal Republic, Indonesia, Iran (with reservations), Ireland, Lebanon, Liberia, New Zealand, Panama, Portugal, Switzerland, Tunisia, the United Kingdom, the United States, and Venezuela.

A CONSIDERATION OF THE LEGAL STATUS OF THE GULF OF AQABA

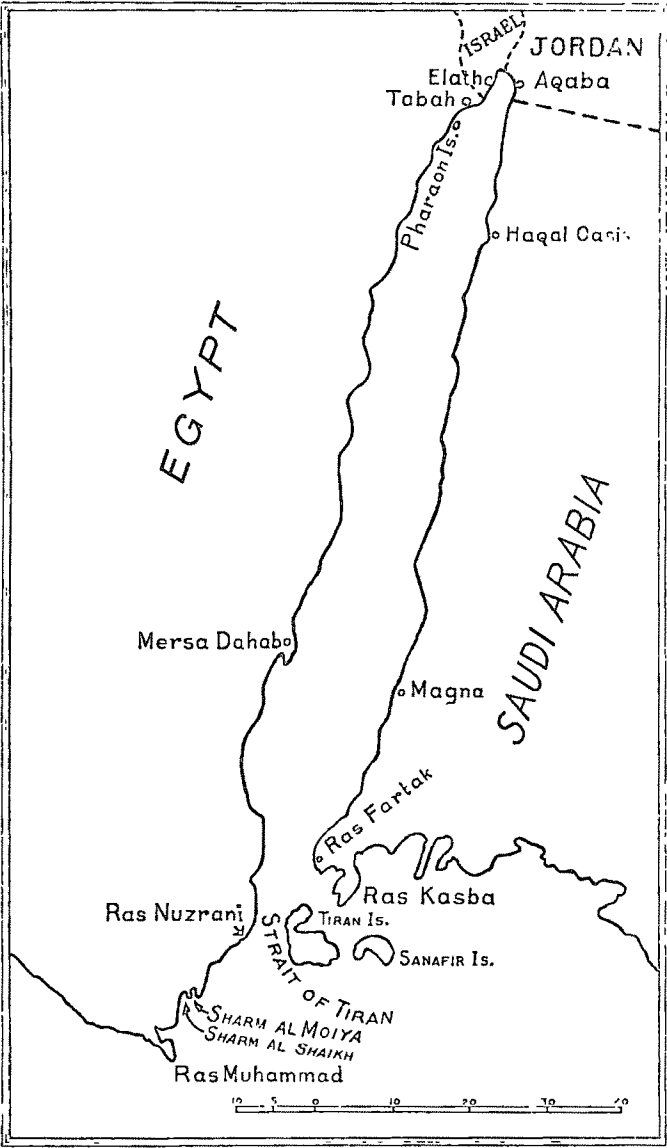
BY CHARLES B. SELAK, JR.

*Of the District of Columbia Bar **

The status under international law of the Gulf of Aqaba has come to be a matter of concern not only to the several littoral states, but also to the international community. The basic issue, that of freedom of navigation in this arm of the Red Sea, has been brought into focus as a result of restrictive efforts of several of the coastal states with respect to Israeli shipping, for Arab-Israeli hostility has given political, strategic, commercial and even religious significance to a water area which, until recently, had attracted little attention. Without taking a position on the Palestine question, which remains essentially political, it is intended herein to describe the background of the Gulf of Aqaba problem, to explain the several points of view held with respect to the Gulf's status, and to consider what principles of international law may be applicable to this water area and the entrances thereto.

The Gulf of Aqaba is the eastern of two arms into which the Sinai Peninsula separates the Red Sea at its northern extremity; the western arm is the Gulf of Suez, which leads into the Suez Canal. The Gulf of Aqaba is somewhat over one hundred miles in length, and varies in width between three miles on the narrow bay at its northern end and seventeen miles at its widest point. The mouth—from Sinai Peninsula headland to Arabian Peninsula headland—is approximately nine miles in width. A valve-shaped island at the entrance, however, Tiran Island, further narrows the possibility of access to the Gulf, and, in fact, creates two entrances thereto. The western and principal entrance passes between Tiran Island and the Sinai Peninsula shore. It is approximately four miles in breadth, and has two channels, Enterprise Passage and Grafton Passage. The former, which lies close to the Sinai Peninsula coast, is the principal shipping channel into the Gulf, and the only channel which can be navigated safely by vessels of substantial size. Grafton Passage, separated from Enterprise Passage by a series of reefs, lies close to Tiran Island. Another island, Sanafir, is situated two miles east of Tiran. The eastern entrance to the Gulf passes between the two islands and the Arabian mainland, and appears seldom to be used, since reefs therein render navigation difficult except for small boats. The narrow belt of water between the two islands appears also to be non-navigable because of reefs. References in public statements have

* The views expressed herein are the personal views of the author. He wishes to express his thanks to Judge Jasper Y. Brinton, formerly President of the Court of Appeals of the Mixed Courts of Egypt, for material furnished and valuable suggestions made in connection with the article's preparation.



THE GULF OF AQABA

been made both to the Strait of Tiran and to the Straits of Tiran. It is unclear which designation is correct. However, the first obviously refers to the western and principal entrance, and the second to both entrances.

For over a thousand years the Gulf has been surrounded by Arab territories. By approximately 700 A.D. the Arab conquest of a large part of the area known today as the Middle East had been completed, and from that time until approximately 1517, when the Arab territories surrounding the Gulf were brought under the political control of the Ottoman Empire, the Gulf apparently was an exclusively Arab water area. From 1517 until the end of World War I the Gulf was controlled by the Empire.¹ During that long period the question of the Gulf's status does not appear to have arisen. When, however, during the Middle Ages a Crusader fleet made an incursion into the Gulf and the Red Sea from its base at the northern end of the Gulf, the whole Muslim world was shocked at the invasion of water areas which constituted a gateway of the pilgrims to the Islamic Holy Cities of Mecca and Medina.²

Today, four coastal states enclose the Gulf—the United Arab Republic,³ Saudi Arabia, Jordan [for a short time a member of the Arab Union of Iraq and Jordan],⁴ and Israel. Egypt, one of the partners constituting the United Arab Republic, is sovereign of the western or Sinai Peninsula coast, and Saudi Arabia of the eastern coast. Jordan and Israel each possess a small coastal strip at the very head of the Gulf. The islands of Tiran and Sanafir were under Egyptian occupation at the beginning of the Israeli drive against Egypt which commenced on October 29, 1956. Neither Egypt (UAR), Saudi Arabia, nor Jordan maintains diplomatic relations with Israel, nor, in fact, have any of them recognized its existence since its establishment in the spring of 1948.

The ancient port of Aqaba fell into decay during the Middle Ages, but

¹ See H. L. Hoskins, *The Middle East* 99 (N. Y., 1954); George Stitt, *A Prince of Arabia* 16 (London, 1948); George Antonius, *The Arab Awakening* 19 (Philadelphia, 1938); and H. J. Liebesny, "International Relations of Arabia," 1 *Middle East Journal* 149 (1947).

² See 2 Steven Runciman, *A History of the Crusades* 436-437 (Cambridge University Press, 1952).

³ The union of Egypt and Syria to form the United Arab Republic was proclaimed officially on Feb. 21, 1958. *N. Y. Herald Tribune* (European ed.), Feb. 26, 1958, p. 2. Text of Proclamation in *Egyptian Economic and Political Review*, March, 1958, p. 26; for Provisional Constitution, see *ibid.*, April, 1958, p. 23, and 13 *Comunità Internazionale* 409 (1958). Egypt only has a coastline on the Gulf.

⁴ On March 19, 1958, Iraq and Jordan announced the terms of their new federal constitution, which recognizes King Faisal of Iraq as the senior monarch of the Arab Union. *New York Herald Tribune* (European ed.), March 20, 1958, p. 2. Text of Constitution in 13 *Comunità Internazionale* 413 (1958).

On May 27, 1958, King Faisal of Iraq was sworn in as President of the Arab Union when the Federal Parliament held its first session in Amman, Jordan. *Washington Post and Times Herald*, May 28, 1958, p. A5. On Aug. 2, 1958, King Husayn of Jordan announced the formal dissolution of the Arab Union of Iraq and Jordan. The Union had been *de facto* terminated by the Iraqi revolt of July 14, 1958. See *New York Times*, Aug. 3, 1958, pp. 1 and 10.

sustained a revival during the early part of the nineteenth century, and, in 1841, was recognized by the Ottoman Government as belonging, with the Sinai Peninsula, to Egypt because of its regular use by Egyptian pilgrims proceeding overland to Mecca and Medina. In 1892, after Egyptian pilgrims began to use the sea route to the Muslim Holy Places, the Ottoman Empire resumed possession of Aqaba. In 1902 the Turks occupied the neighboring post of Tabah, supposed to be Solomon's ancient port of Ezion-Geber.⁵ Great Britain on behalf of Egypt objected to the occupation, and the Turks withdrew.⁶ The frontier between Egypt, nominally an Ottoman province, but in effect a British protectorate since 1882,⁷ and the area which later became the Palestine Mandate, was delimited by the agreement signed and exchanged at Rafah on October 1, 1906, between the Commissioners of the Turkish Sultanate and the Commissioners of the Egyptian Khedivate, concerning the fixing of a Separating Administrative Line between the Vilayet of Hejaz and Governorate of Jerusalem and the Sinai Peninsula. The frontier was fixed beginning at Umm Rash Rash or Ras Tabah on the western shore of the Gulf of Aqaba (approximately one mile northeast of the town of Tabah) and extending in a general north northwesterly direction to the Mediterranean Sea, passing 390 meters (approximately 426 yards) southwest of Bir Rafah (in the present Gaza Strip area) near that sea. Boundary pillars were erected at intervals along the frontier.⁸ This boundary has remained unchanged since 1906, although it has long ceased to be a mere administrative boundary between two units of the Ottoman Empire. It is the same as that referred to as the Egyptian frontier in the Rhodes General Armistice Agreement of February 24, 1949, between Egypt and Israel.⁹ The Sinai Peninsula thus was included within the territory of Egypt. Since Egypt achieved its formal independence in 1922,¹⁰ it clearly has been sovereign

⁵ Background paper on the Gulf of Aqaba, by the Ministry of Foreign Affairs of Israel (Jerusalem, May, 1956), p. 5.

⁶ Article on the Gulf of Aqaba in *Encyclopedia Britannica*, Vol. 2 (14th ed.).

⁷ Hoskins, *op. cit.*, at p. 61, states that Egypt's status as a British protectorate "existed in most essentials since 1877 and in all since 1914." The Anglo-Egyptian agreement of Sept. 7, 1877, "to all intents envisaged Great Britain as the protector of Egyptian territorial interests." *Ibid.*, p. 60. It was in 1882, however, that British troops actually occupied Egypt. See C. B. Selak, Jr., "The Suez Canal Base Agreement of 1954," 49 A.J.I.L. 487-505 at 490 (1955). On Dec. 18, 1914, Great Britain declared the abolition of Ottoman suzerainty over Egypt (108 Brit. and For. State Papers 185 (1914-Part II)), an act accepted retroactively to Nov. 5, 1914, by the Turkish Republic, successor state to the Ottoman Empire, through the Treaty of Lausanne of July 23, 1923 (117 *ibid.* 543-591 at 549 (1923)).

⁸ For text of agreement, see 99 *ibid.* 482-484 (1905-1906).

⁹ U.N. Security Council, 4th Year, Official Records, Spec. Supp. No. 3; 6 *Revue Egyptienne de Droit International* 299-308 (1950); J. C. Hurewitz, *Diplomacy in the Near and Middle East*, Vol. II, pp. 299-304 (Princeton, 1956); Israeli Foreign Ministry Background Paper on Gulf of Aqaba, *op. cit.*, pp. 3-6.

¹⁰ Great Britain and Egypt, 1914-1951, Royal Inst. of Int. Affairs, Info. Paper No. 19 pp. 8-9 (London, 1952).

of the western shore (Sinai Peninsula coast) of the Gulf of Aqaba from Ras Tabah southwards.¹¹

The Hejaz's independence of the Ottoman Empire was recognized formally on December 10, 1916, by the United Kingdom, France and Russia, following the "Arab Revolt" against the Turks. In the summer of 1917 Colonel T.E. Lawrence and the Hejaz Army captured Aqaba. The Treaty of San Remo of April 25, 1920, gave the United Kingdom an "A" Mandate for Palestine, which included Trans-Jordan.¹² In 1922 the Palestine Mandate was divided into two parts, Palestine proper and the Amirate of Trans-Jordan, and Abdallah, son of King Husayn of the Hejaz, became Amir of Trans-Jordan. No effort was made at that time to define the border between Trans-Jordan and the Hejaz, since the Hashemite family ruled both areas. When King Husayn was forced to abdicate in 1924 as a result of the invasion of the Hejaz by the Saudi dynasty of Nejd, he took refuge in the Aqaba region. In July, 1925, a Saudi attack on the area being anticipated, Great Britain, as the Mandatory Power, ejected King Husayn, who retired to Cyprus. Britain then began to administer the Aqaba-Ma'an area as a part of Trans-Jordan.¹³

As of January 8, 1926, the Sa'ud dynasty incorporated the Hejaz into its dominions, and by the Treaty of Jidda of May 20, 1927,¹⁴ the British Government recognized the complete and absolute independence of His Majesty the King of the Hejaz and Nejd and its Dependencies. As of September 2, 1932, King 'Abd al-Aziz ibn Sa'ud changed the name of his consolidated domain to the Kingdom of Saudi Arabia, the Arabia of the Sa'uds.

A dispute regarding the border between Trans-Jordan and the Hejaz made it expedient to append an exchange of notes to the Treaty of Jidda to provide that the frontier should run as follows:

¹¹ A contrary view is expressed by L. M. Bloomfield, *Egypt, Israel and the Gulf of Aqaba in International Law* (Toronto, Canada, 1957). Bloomfield asserts that Turkey never recognized that an area south of a line drawn from Tabah to Suez, the South Sinai Peninsula, formed a part of Egypt, and states that Egypt was merely given administrative rights over this area by the 1906 agreement (p. 139). He concludes (p. 164) that therefore Egypt "does not enjoy territorial water rights in the Gulf of Aqaba." Although he admits that neither Turkey nor the United Kingdom have made claims with respect to this area in recent times, he asserts that "this does not necessarily imply a renunciation in International Law of such claim, if it exists." (p. 142.) He suggests a U.N. trusteeship over this area to assure the maintenance of the international character of the Strait of Tiran and the Gulf of Aqaba (p. 165).

Inasmuch as the agreement of 1906 concerned only the fixing of an administrative line between Egypt, then a part of Turkey, and Palestine, also a part of Turkey, it is difficult to see why a distinction should be made between the northern and southern parts of the Sinai Peninsula. In any event, Egypt since 1922 appears to have exercised undisputed sovereignty over the whole peninsula.

¹² Stewart Perowne, *The One Remains* 10 (London, 1954).

¹³ Article on Gulf of Aqaba in *Encyclopedia Britannica*, Vol. 2 (14th ed.).

¹⁴ 11 C. V. Aitchison, *A Collection of Treaties, Engagements and Sanads* 189 and 227 (5th ed., Delhi, 1933). On the birth of Saudi Arabia, see Benoist-Mechin, *Ibn Saud, ou La Naissance d'un Royaume* (Paris, 1955), trans. into English by Denis Weaver, under the title, *Arabian Destiny* (London, 1957).

From the intersection of meridian 38°E and parallel 29°35'N to a point on the Hejaz Railway two miles south of Mudawwara. From this point it proceeds in a straight line to a point on the Gulf of Aqaba two miles south of the town of Aqaba.¹⁵

This line purported to be only a *de facto* administrative frontier, and not a definitive boundary, since the exchange of notes referred to "favorable circumstances [which] will permit a final settlement of this question." ¹⁶ King 'Abd al-Aziz, who regarded the incorporation of the Aqaba-Ma'an area into Trans-Jordan as a usurpation of territory which rightfully belonged to the Hejaz, insisted upon this qualification.

The Treaty of 1927 was extended by exchanges of notes in 1936 and again in 1943, without reference to a final boundary settlement between Trans-Jordan and Saudi Arabia. There has been no boundary settlement since Trans-Jordan on March 22, 1946, ceased to have mandate status. At the present time Saudi Arabia clearly is sovereign of the eastern littoral of the Gulf of Aqaba from a point two miles south of the town of Aqaba to the Gulf's entrance.

Jordan and Israel each possess a small coastal strip on the truncated bay at the very head of the Gulf. That of Jordan is approximately four miles in breadth, and that of Israel, five miles in breadth. When in 1922 Palestine proper and Trans-Jordan were separated, the boundary was traced from a point two miles west of the town of Aqaba northward along the Wadi al-Arabah.¹⁷ This boundary was fixed upon in 1949 by the Jordanian-Israeli Mixed Armistice Commission as the Armistice line between Israel's territory of the Negev and the Hashemite Kingdom of Jordan (as Trans-Jordan came to be called as of April 26, 1949).¹⁸ Israel secured control of that part of Palestine known as the Negev, including the five-mile strip on the Gulf of Aqaba, during the hostilities which followed the termination on May 15, 1948, of the British Mandate for Palestine, and the proclamation of the state of Israel at approximately the same time.¹⁹ Israel's port of Elath (Eilat) is situated on this five-mile strip.

¹⁵ Aitchison, *op. cit.*, p. 229.

¹⁶ *Ibid.*, p. 230. And see exchange of notes between the United Kingdom and Saudi Arabian governments of Oct. 3, 1943, Treaty Series No. 13 (1947), Cmd. 7061 (British), and 145 Brit. and For. State Papers 157-158 (1943-1945).

¹⁷ A "Memorandum on the Application of the Mandate for Palestine in Trans-Jordan" was approved at Geneva, September 16, 1922, and provided that: "Trans-Jordan . . . comprises all territory lying to the east of a line drawn from a point two miles west of the town of Aqaba on the Gulf of that name up the center of the Wadi al-Arabah, Dead Sea and River Jordan to its junction with the River Yarmuk; thence up the center of that river to the Syrian frontier." League of Nations Official Journal, November, 1922, p. 1390; 17 A.J.I.L. Supp. 172 (1923); 1 Hudson, International Legislation 120-121 (Wash., D. C., 1934).

¹⁸ See Jordanian-Israeli General Armistice Agreement of April 3, 1949, U.N. Doc. S/1302, as corrected April 21, 1949, U.N. Security Council, 4th Year, Official Records, Spec. Supp. No. 1, Art. V, and Map I of Annex I; also U. S. Dept. of State, Documents and State Papers, Vol. I, No. 14 (May, 1949), pp. 806-809, at 807. See also Raphael Patai, The Kingdom of Jordan 48 (Princeton, 1958).

¹⁹ See article by Harry Gilroy, "Pearl of Negev may Earn its Name," in N. Y. Times, April 11, 1954, which refers to Israel's "five mile strip on the Gulf of Aqaba."

With respect to the islands of Tiran and Sanafir, Egyptian Delegate Azmi informed the Security Council on February 15, 1954, that the islands had constituted Egyptian territory since 1906, at the time of the delimitation of the frontier between Egypt and Palestine.²⁰ Under date of March 31, 1957, however, the Saudi Arabian Government addressed a circular note to the missions of "friendly Governments" in Jidda, which asserted that the islands "are Saudi Arabian property."²¹ A memorandum attached to a letter dated April 12, 1957, from the Permanent Representative of Saudi Arabia to the United Nations, addressed to the Secretary General, stated that "these two islands are Saudi Arabian."²² Egypt does not appear to have questioned this Saudi claim of sovereignty.

The claims of the coastal states of the Gulf with respect to breadth of territorial sea and contiguous zones may be summarized as follows:

(a) *Saudi Arabia*: Territorial Waters Decree of May 28, 1949.

Article 5. The coastal sea of Saudi Arabia lies outside the inland waters of the Kingdom and extends seaward for a distance of six nautical miles.

Article 9. With a view to assuring compliance with the laws of the Kingdom relating to security, navigation, and fiscal matters, maritime surveillance may be exercised in a contiguous zone outside the coastal sea, extending for a further distance of six nautical miles and measured from the base-lines of the coastal sea, provided however, that nothing in this article shall be deemed to apply to the rights of the Kingdom with respect to fishing.²³

(b) *Egypt*: Territorial Waters Decree of January 15, 1951.

Article 5. Identical with Article 5 of the Saudi decree of May 28, 1949.

Article 9. Identical with Article 9 of the Saudi decree of May 28, 1949, except that after the phrase "extending for a further distance of six nautical miles," it continues, "beyond the six nautical miles measured from the baselines of the coastal sea; but no provision of this article shall affect the rights of the Kingdom of Egypt with respect to fishing."²⁴

(c) *Jordan*: Jordan has no outlet to the high seas except the four-mile strip of coast at the port of Aqaba. Fisheries Act No. 25 of December 2, 1943, states, Article 2, that: "'Transjordan includes that part of the sea which is contiguous to the coast of Transjordan and lies within a distance of three nautical miles from the low-water line.'" ²⁵

²⁰ See Verbatim Record of the 659th Meeting of the Security Council, Doc. S/P.V. 659 (Feb. 15, 1954), p. 53.

²¹ Note of 29 Sha'ban 1376, corresponding to March 31, 1957.

²² See U.N. Doc. A/3575, April 15, 1957, p. 3.

²³ Decree No. 6/4/5/3711, May 28, 1949, Umm al-Qura (Mecca), May 29, 1949; 43 A.J.I.L. Supp. 155 (1949); Laws and Regulations on the Regime of the High Seas, United Nations Legislative Series, Vol. I, p. 89 (N. Y., 1951). Italics added.

²⁴ Decree of Jan. 15, 1951, Al-Waqayih al-Misriyah (Official Journal), Vol. 78, No. 6, Jan. 18, 1951; Laws and Regulations on the Regime of the High Seas, *op. cit.*, Vol. I, p. 307.

²⁵ Laws and Regulations on the Regime of the Territorial Sea, United Nations Legislative Series, p. 522 (N. Y., 1957).

(d) Israel: Territorial Waters Decree of September 11, 1955, as follows:

The maritime frontier of the State of Israel is placed at a distance of six nautical miles from the coast measured from the low-water line, and the areas of the sea between the low-water line as aforesaid and the maritime frontier, together with the airspace above them, constitute the maritime areas of Israel.²⁶

Since the Gulf of Aqaba is only seventeen miles in breadth at its widest point, and only three miles in breadth on the bay at its head, it is obvious that the several national claims to jurisdiction overlap at some points, and especially on the bay. Further, Enterprise Passage being the only practicable channel for access to the Gulf, ships proceeding to or coming from Aqaba or Elath must of necessity transit the territorial sea of Egypt. The question of freedom of navigation in the Gulf of Aqaba was raised initially by certain actions of the Egyptian Government against Israeli and Israeli-connected shipping. Egypt does not appear, however, to have brought into issue the status of the Gulf *per se*. ✓

In 1946, two years before Israel became a state, the Arab League had instituted a boycott of the Zionists of Palestine.²⁷ After Israel's establishment in May, 1948, hostilities broke out between Israel and several of the surrounding Arab states, including Egypt. The Egyptian Government prescribed visit and search measures at the Suez Canal with respect to ships proceeding to Israeli ports,²⁸ and later extended these measures to the Gulf of Aqaba.²⁹

The Egyptian Government justified such measures by asserting that the Palestine hostilities of 1948 constituted a state of war between Egypt and Israel, a condition which, it has maintained, was not terminated by the signing of the Rhodes General Armistice Agreement on February 24, 1949. Its reasoning has been that the agreement merely ended active hostilities and was not equivalent to a treaty of peace.³⁰ It has concluded that in

²⁶ Territorial Waters Decree of 24 Elul 5715 (Sept. 11, 1955), Yalkut Hapirsumim (Official Gazette), No. 442, Sept. 22, 1955; U.N. General Assembly, Doc. A/CN.4/99/Add. 1, p. 16; 50 A.J.I.L. 1001 (1956); Yearbook of the International Law Commission, 1956, Vol. II, p. 54(A/CN.4/Ser.A/1956/Add. 1).

²⁷ See B. Y. Boutros-Ghali, "The Arab League, 1945-1955," International Conciliation, No. 498, pp. 406-421 (May, 1954, but written and published in the spring of 1955).

²⁸ J. C. Hurewitz, "Unity and Disunity in the Middle East," *ibid.*, No. 481, p. 240 (May, 1952); U.N. Press Release SC/1567, Jan. 28, 1954.

²⁹ According to Hoskins, *op. cit.* 70, Egyptian measures against Israeli shipping in the Gulf were undertaken in the summer of 1950, when "the Egyptian Government proceeded to install shore batteries near the tip of the Sinai Peninsula to command the entrance to the Gulf of Aqaba. From this point of vantage control could be exercised over all shipping in the Gulf of Aqaba and vessels could be prevented from passing to the emergent Israeli port of Elath." The same writer states that the Egyptian Under Secretary for Foreign Affairs justified Egypt's action by asserting that "Egypt's sovereignty over navigation in her territorial waters is affirmed by international law."

³⁰ Egyptian Delegate Azmi summarized the Egyptian position in the Security Council on March 12, 1954. He stated that since "an armed struggle has taken place between Egypt and other Arab States on the one side and Israel on the other . . . the description to be given this state of affairs is not affected by the absence of a declaration of war

consequence of this condition the international law of war rather than the international law of peace is applicable to Israeli shipping in the Strait of Tiran, and that, accordingly, passage of Israeli shipping into and through the Gulf cannot be regarded as "innocent."³¹

A recent article in the military section of an Egyptian review has raised the additional question of "Israel's right to occupy Elath itself," reasoning that since the occupation by Israeli forces of the southern Negev and Elath took place after the signing of the Rhodes General Armistice Agreement on February 24, 1949, such occupation was a violation of the agreement.³² —

of the traditional kind or by the lack of recognition of Israel by the Arab States, and there can be no doubt that a war has taken place between Egypt and Israel." He stated further that "an armistice, an agreement between belligerents, has never been considered to put an end to a state of war or to create a state of peace, even that type of armistice agreements which have come to be known as 'capitulation armistices,' where obviously no likelihood of further recourse to arms exists, for example the 1871 and 1918 armistices with Germany." Citing English and American authorities, including a U. S. Court of Claims decision (*Walter v. The Government of the United States of America*, June 28, 1948), he asserted "it is clear from the foregoing that an armistice does not end a war, since it is recognized that a state of war does not end until a peace treaty has been ratified."

On Egypt's visit and search measures, Mr. Azmi asserted that Egypt was exercising a legitimate right of self-defense which the duty of self-preservation gives to belligerent nations. U.N. Security Council, Verbatim Record, 641st Meeting, March 12, 1954, S/P.V. 661, pp. 10-15.

³¹ An editorial in the Egyptian Gazette of March 7, 1957, at p. 2, entitled "Tiran and the Law," asserted that "since the Armistice Agreement was signed in 1949 ships of all nationalities have used the Tiran Strait with no obstruction on the part of Egypt. . . . Egypt has only insisted on stopping ships flying the Israeli flag because they do not belong to a 'neutral' state, and, as such, cannot be considered as exercising the right of innocent passage . . . international law is divided into two sections—the Law of War and the Law of Peace. What should be applied (with respect to Israeli shipping) in the case of Tiran Strait and the Suez Canal is the Law of War and not the Law of Peace . . . Egypt has officially announced that she is in a state of war with Israel, and by the mere fact of signing the Armistice Agreement, which ended the fighting, both sides admitted that the state of war exists . . . the agreement itself says that it is only a prelude to the conclusion of peace."

The editorial added that "the Tiran Strait falls in the same category as the Dardanelles (which) lead to the Black Sea. Both the Gulf of Aqaba and the Black Sea border on more than one state. But there is one difference between the Gulf of Aqaba and the Black Sea. In the case of the Black Sea the States bordering on it have been there from time immemorial but the state of Israeli is still a newcomer in the Gulf of Aqaba and has not so far received recognition of the states which control the Gulf . . . the right of innocent passage through the Dardanelles in time of peace was only introduced by a series of international treaties after years of war. The last of these treaties was the Montreux Convention of July 20, 1936, which, while accepting the principle of free navigation, gave Turkey the right to prohibit passage of ships of any state at war with her."

³² The article, entitled "The Trouble About Aqaba," appeared in the Egyptian Economic and Political Review, February, 1957, Military Section, pp. XI-XII. It asserted that until the question of Israel's right to occupy Elath is settled, "the fundamental issue as to whether the waters of Aqaba are or are not an international waterway cannot be discussed. . . . Egypt is a belligerent, and the recent Israeli aggression . . . underlines the state of war that exists between her and the Israelis. In such circumstances the Gulf of Aqaba must inevitably play a major military part

The Israeli Government has asserted vigorously that the Gulf of Aqaba and the Strait of Tiran should be free and open to all shipping, including its own. Through its representative on the Security Council, the Israeli Government has affirmed that "there is no value whatever in the Egyptian contention that 'an armistice does not put an end to a state of war.'"³² The Permanent Representative of Israel at the United Nations addressed a letter dated January 29, 1954, to the President of the Security Council, to which was attached a memorandum dated January 28, 1954, which contained that

... her security and the security of her long Red Sea and Sinai coastline. . . . Egypt's legitimate rights of self-defense . . . the Israeli argument that Egypt is blocking an international waterway is defeated by the Israelis themselves, who have so far failed to give the world any precise indications as to the exact location of their allegedly legal boundaries. . . . Whether Elath is or is not Israeli territory remains a subject of debate.

"... The fact that Israel today occupies Elath can be partly traced to the circumstances and motives affecting Britain when the Mandate boundaries were established in 1919. Aware of the military and political importance of the Gulf of Aqaba . . . Britain arranged that the Palestine Mandate territory include Elath and a few hundred yards of frontage on the Gulf to separate Egypt and the new Amirate of Trans-Jordan. With the British withdrawal from Palestine in 1948, Israeli forces occupied Elath, where they have remained ever since, a serious threat to Arab security and an unlawful obstacle violating the freedom of passage between Egypt and Jordan.

"Israeli action in the South came after the Armistice Agreement of February 24th and in clear violation of its terms . . . the Israelis were determined to secure a foothold on the Gulf of Aqaba . . . for only an outlet on the Gulf could enable them to gain access to the Red Sea and beyond to the Indian Ocean without being compelled to go through the Suez Canal. . . . In addition, the subsoil of the Negev contained a variety of important mineral deposits . . .

"... the Southern Negev was since June 1948 under Jordanian control . . . the British forces in Aqaba (were) the main Jordanian defense . . . although the British Government had repeatedly expressed the view that Israel had no claim or right to occupy the area of the Southern Negev, orders came from London on March 10 (1949) . . . that British forces were not to interfere . . . unless attacked . . . Jordanian forces were faced with an intolerable situation on the night of March 10, and withdrew. The next morning unopposed Israeli forces occupied (Elath)."

The Israeli Delegate Abba Eban summarized the Israeli position in the Security Council on July 26, 1951, when he referred to what he called "The illegitimacy of the Egyptian blockade" and "the contradiction between this practice and the Armistice Agreement." He asserted that "this Armistice Agreement is not a mere suspension of hostilities, leaving belligerent rights intact. This Agreement, as its own text constantly reiterates, is a permanent and irrevocable renunciation of all hostile acts. . . . It is vain for Egypt to hark back to a previous era in which The Hague regulations of 1907 defined an armistice as a mere suspension of hostilities. . . . What is the relevance of this traditional concept of armistice to a specific Armistice Agreement whose text recognizes neither war nor belligerency and declares instead that: 'This Agreement . . . shall remain in force until a peaceful settlement between the parties is achieved. . . .'" Mr. Eban further asserted that Egypt "manufactured" the "theory of a state of war" for the "sole purpose of creating a 'legal' pretext for the Suez blockade," and concluded with the statement that "my Government instructs me to declare that Israel is in no state of war with Egypt and denies that Egypt has the least right to be at war with Israel." U.N. Security Council, Official Records, 549th Meeting, July 26, 1951, S/P.V.549, pp. 3-12.

on January 25, 1954, regulations were instituted by Egypt to prevent passage of ships to the Israeli port of Eilat. Whether such interference is carried out at the Suez Canal or from Egyptian positions overlooking the Gulf of Aqaba they are equally piratical and illegal. The denial by the Security Council of Egypt's alleged rights of war renders the blockade practices in the Suez Canal and in the Gulf of Eilat (Aqaba) comprehensively illegal.³⁴

The Permanent Representative, Mr. Abba Eban, was referring to the Security Council's resolution of September 1, 1951,³⁵ and cited it as having decided that Egyptian interference with Israeli shipping was "an abuse of the exercise of the right of visit, search and seizure," and as based on the principle that since the General Armistice Agreement of 1949 marked the permanent end of the military phase of the conflict and specifically forbade all hostile acts, "neither party could reasonably assert that it was actively a belligerent or required to exercise the right of visit, search and seizure for any legitimate purpose of self-defense."³⁶

There has been some interference with non-Israeli-connected shipping proceeding to Aqaba. On July 1, 1951, the British ship *Empire Roach*, cleared by Egyptian customs authorities at Suez for the port of Aqaba, was stopped by an Egyptian patrol vessel in the Strait of Tiran.³⁷ In the late summer of 1955 the British ship *Anshun*, carrying Jordanian pilgrims from Aqaba to Jidda, was fired on by Egyptian shore batteries as a result of a misunderstanding.

In September, 1955, the Egyptian Government put into effect a regulation requiring vessels intending to enter the Gulf of Aqaba to secure a permit to do so from the Egyptian Blockade of Israel Office 72 hours before making the trip.³⁸ Israeli Prime Minister Ben Gurion told the Israeli Parliament on October 18, 1955, that this regulation was aimed at shipping destined for Elath, and characterized it as not only contrary to Security Council resolutions but also to principles of international law relating to freedom of shipping in open waters and in straits connecting seas. On September 12, 1955, the British Foreign Office issued a statement to the effect that the Gulf must be regarded as an international waterway, with free access to the ships of all nations, and on November 7 British Foreign Secretary Macmillan told the House of Commons that the United Kingdom Government had made it clear that it did not "recognize the legality of the blockade of Israel nor the right of the Egyptian Government to grant or withhold permission to ships to use the international channel at the mouth of the Gulf of Aqaba."³⁹ When the Jordanian Government ex-

³⁴ U.N. Doc. S/3168/Add. 1 (Jan. 29, 1954), p. 3.

³⁵ U.N. Doc. S/2322.

³⁶ U.N. Doc. S/3168/Add. 1 (Jan. 29, 1954), p. 2.

³⁷ Hoskins, *op. cit.* 70.

³⁸ Al-Akhbar (Cairo daily), Sept. 11, 1955.

³⁹ N. Y. Herald Tribune (European ed.), Sept. 13, 1955, p. 3; Great Britain, Parl. Deb. (Hansard), House of Commons, Official Report, Vol. 545, No. 48, Nov. 7, 1955, Col. 1454; and see comment by Moshe Perlmann, "The Middle East in the Summer of 1955," 6 Middle Eastern Affairs 258-270, at 258-259 (1955).

pressed objections to the regulation, the Egyptian Government made special arrangements for Jordanian shipping.

On October 29, 1956, Israeli forces launched an offensive against Egyptian forces in the Sinai Peninsula. Shortly thereafter Israeli troops seized Egyptian positions at Sharm al-Shaikh and Ras Nuzrani, commanding the entrance to the Gulf of Aqaba, and forced the withdrawal of such Egyptian forces as were in occupation of Tiran and Sanafir Islands.⁴⁰

The Israeli Government was reluctant, in spite of two United Nations resolutions of February 2, 1957, "calling on Israel to complete its withdrawal behind the Armistice demarcation line without further delay," and to remove its forces from positions commanding the entrance to the Gulf, lest Egyptian measures against Israeli shipping be reinstituted. It sought a guarantee that, in return for withdrawal, the Gulf would remain open to its shipping, and would be unequivocally recognized as an international waterway.⁴²

Although Prime Minister Ben Gurion initially rejected, by letter of February 7, 1957, a plea from President Eisenhower for Israeli withdrawal,⁴³ the Israeli Government later announced, on March 1, 1957, that it had decided on "full and prompt withdrawal from the Sharm al-Shaikh area and the Gaza Strip, in compliance with General Assembly resolution 1124 (XI) of February 2, 1957." Foreign Minister Golda Meir, in making this announcement to the U.N. General Assembly, noted that:

Our sole purpose has been to ensure that, on the withdrawal of Israeli forces, continued freedom of navigation will exist for Israel and international shipping in the Gulf of Aqaba and the Straits of Tiran.

She referred to a United States memorandum to Israel of February 11, 1957, which discussed international rights in the Gulf of Aqaba, and commented that:

My Government has subsequently learned with gratification that other leading maritime Powers are prepared to subscribe to the doctrine set out in the U. S. memorandum of 11 February and have a similar intention to exercise their rights of free and innocent passage in the Gulf and the Straits.

Mrs. Meir added that: "In the light of these doctrines, policies and arrangements by the United Nations and the maritime Powers, my Government is confident that free and innocent passage for international and Israeli ship-

⁴⁰ Annual Report of the Secretary-General on the Work of the Organization, 16 June 1956-15 June 1957, General Assembly, 112th Sess., Official Records, Supp. No. 1 (A/C.9.1), pp. 8-10.

⁴² 33 Doc. of State Bulletin 327-328 (1957); The Times (London), Feb. 4, 1957, p. 8. The two U.N. resolutions called attention to earlier resolutions on the same subject of Nov. 2, 4, 7 and 24, 1956, and Jan. 19, 1957. See Annual Report of Sec. Gen., *op. cit.* 8-22.

⁴³ N. Y. Herald Tribune (European ed.), Jan. 5-6, 1957, p. 1, and Feb. 21, 1957, p. 1. See also Annual Report of Sec. Gen., *op. cit.* 22.

⁴⁴ N. Y. Herald Tribune (European ed.), Feb. 9-10, 1957, p. 1.

ping will continue to be fully maintained after Israel's withdrawal." ⁴⁴ She was referring to plans for a United Nations force to assume responsibility in the Sharm al-Shaikh area.

President Eisenhower had stated on February 20 that:

With reference to the passage into and through the Gulf of Aqaba, we expressed the conviction that the gulf constitutes international waters and that no nation has the right to prevent free and innocent passage in the gulf. We announced that the United States was prepared to exercise this right itself and to join with others to secure general recognition of this right. ⁴⁵

On March 1 U. S. Ambassador Henry Cabot Lodge on behalf of his government welcomed Israel's announcement of intention to withdraw. He told the General Assembly that:

Once Israel has completed its withdrawal in accordance with the resolutions of the General Assembly, and in view of the measures taken by the United Nations to deal with the situation, there is no basis for either party to the Armistice Agreement to assert or exercise any belligerent rights. ⁴⁶

On the same day Ambassador Lodge referred to a United States *aide-mémoire* to Israel dated February 11, 1957, made public February 17. The *aide-mémoire* reads as follows:

The United States believes that the Gulf comprehends international waters and that no nation has the right to prevent free and innocent passage in the Gulf and through the Straits giving access thereto. We have in mind not only commercial usage, but the passage of pilgrims on religious missions, which should be fully respected.

The United States recalls that on January 28, 1950, the Egyptian Ministry of Foreign Affairs informed the United States that the Egyptian occupation of the two islands of Tiran and Sanafir at the entrance of the Gulf of Aqaba was only to protect the islands themselves against possible damage or violation and that "this occupation being in no way conceived in a spirit of obstructing in any way innocent passage through the stretch of water separating these two Is-

⁴⁴ General Assembly, 11th Sess., Off. Records, 666th Plenary Meeting, March 1, 1957 (A/P.V. 666), p. 1275. Mrs. Meir summed up Israel's policy *re* the Gulf and the Straits as follows:

"The Government of Israel believes that the Gulf of Aqaba comprehends international waters and that no nation has the right to prevent free and innocent passage in the Gulf and through the Straits giving access thereto, in accordance with the generally accepted definition of those terms in the law of the sea . . . Israel will do nothing to impede free and innocent passage by ships of Arab countries bound to Arab ports, or any other destination. . . . Israel will protect ships of its own flag exercising the signs of free and innocent passage on the high seas and in international waters. Interference, by armed force, with ships of Israel flag exercising free and innocent passage in the Gulf of Aqaba and through the Straits of Tiran will be regarded by Israel as an attack entitling it to exercise its inherent right of self-defense under Article 51 of the United Nations Charter. . . ." *Ibid.* 1276.

⁴⁵ 36 Dept. of State Bulletin 389 (1957).

⁴⁶ *Ibid.* 433 (1957); General Assembly, 11th Sess., Official Records, 666th Plenary Meeting, March 1, 1957 (A/P.V. 666), p. 1278.

lands from the Egyptian coast of Sinai, it follows that this passage, the only practicable one, will remain free as in the past, in conformity with international practices and recognized principles of the law of nations."

In the absence of some overriding decision to the contrary, as by the International Court of Justice, the United States, on behalf of vessels of United States registry, is prepared to exercise the right of free and innocent passage and to join with others to secure general recognition of this right.

Mr. Lodge added that the views expressed in the *aide-mémoire* are to be understood in the sense of the relevant portions of the Report of the United Nations International Law Commission on the Law of the Sea covering the Commission's work at its Eighth Session, from April 23 to July 4, 1956.⁴⁷

At a press conference on March 5, 1957, Secretary of State Dulles referred to the Gulf of Agaba problem as "a highly complicated question of international law." He observed that

in one sense of the word the Straits of Tiran are territorial, because they are less than six miles wide and the generally accepted zone of territorial control is three miles. . . . But it is also a principle of international law that even though waters are territorial, if they give access to a body of water which comprehends international waterways, there is a right of free and innocent passage. . . . the United States view is that the passage should be open unless there is a contrary decision by the International Court of Justice.

Mr. Dulles added, in response to a query regarding occupation of Tiran and Sanafir Islands after Israeli evacuation, that occupancy by Egypt had been arranged between Saudi Arabia and Egypt in 1950, when Saudi Arabia had consented to such occupation, and suggested that "we have no reason to believe that that arrangement will be altered."⁴⁸

During consideration by the General Assembly in February-March, 1957, of the question of Israel's withdrawal from the entrance to the Gulf, the Arab delegates expressed the belief that the problem of Israel's right to free passage through the Gulf went to the very roots of the Palestine question, and ought to be dealt with in the context of a final solution of that question.⁴⁹

Mr. Krishna Menon of India called attention to a statement of Secretary General Hammarskjöld to the effect that "a legal controversy exists as to the extent of the right of innocent passage through these waters,"⁵⁰ and suggested that, such being the case, "the General Assembly cannot decide a legal controversy." He added, however, that

⁴⁷ 36 Dept. of State Bulletin 432 (1957); General Assembly, 11th Sess., Official Records, 666th Plenary Meeting, March 1, 1957 (A/P.V. 666), pp. 1277-1278.

⁴⁸ 36 Dept. of State Bulletin 482-489 (1957).

⁴⁹ See, for example, the comments of Lebanese Foreign Minister Charles Malik, General Assembly, 11th Sess., Official Records, 659th Plenary Meeting (A/P.V. 659), Feb. 22, 1957, pp. 1193-1197; and of Iraqi Foreign Minister Fadil Jamali, *ibid.*, 661st Plenary Meeting (A/P.V. 661), Feb. 26, 1957, pp. 1215-1221.

⁵⁰ Citing U.N. Doc. A/3512 (Jan. 24, 1957), par. 24.

all the existing evidence . . . is on the side that these waters are territorial waters, and the two countries concerned are Saudi Arabia and Egypt . . . I would say that this is an inland sea.

Mr. Menon based this belief upon the fact that various states have held that gulfs and bays indenting their territories with mouths wider than that of the Gulf of Aqaba are territorial.⁵¹ All the water areas which he cited are indentations in the territory of one state only.

Statements of representatives by various maritime Powers, however, supported the position taken by Israel. On March 1, 1957, French delegate Georges-Picot observed that:

The French Government considers that the Gulf of Aqaba, by reasons partly of its breadth and partly of the fact that its shores belong to four different States, constitutes international waters. Consequently it believes, that, in conformity with international law, freedom of navigation should be ensured in the Gulf and the straits which give access to it. In these circumstances no nation has the right to prevent the free and innocent passage of ships, whatever their nationality or type.

. . . It considers that any obstruction of its freedom of passage would be contrary to international law and would, accordingly, entail a possible resort to the measures authorized by Article 51 of the U.N. Charter.

. . . in its view none of the States bordering on the Gulf of Aqaba is in a state of war with any other. . . .⁵²

Mr. Noble, delegate of the United Kingdom, observed on March 4 that he had listened with interest to Mr. Menon's comments, but that:

. . . he overlooked one fact essential to consideration of this problem: the fact that, unlike the fjords of Norway or Hudson Bay in Canada, or the Hudson River here in New York, or any of the other instances which Mr. Menon quoted, the Gulf of Aqaba is not only bounded at its narrow point of entry by two different countries, Egypt and Saudi Arabia, but contains at its head the ports of two further countries: Jordan and Israel. This simple, undeniable fact is in itself enough to put it in a different category from any of the inland waters mentioned by Mr. Krishna Menon.

It is the view of Her Majesty's Government in the United Kingdom that the Straits of Tiran must be regarded as an international waterway, through which the vessels of all nations have a right of passage. Her Majesty's Government will assert this right on behalf of all British shipping and is prepared to join with others to secure general recognition of this right.⁵³

On the same day Mr. Vitetti of Italy noted that:

. . . we consider that the Gulf of Aqaba is an international waterway and that no nation has the right to prevent free and innocent passage in the Gulf of Aqaba and through the Straits giving access thereto. ✓

⁵¹ General Assembly, 11th Sess., Official Records, 665th Plenary Meeting (A/P.V.665), March 1, 1957, pp. 1267-1274.

⁵² *Ibid.*, 666th Plenary Meeting (A/P.V.666), March 1, 1957, p. 1280.

⁵³ General Assembly, 11th Sess., Official Records, 667th Plenary Meeting (A/P.V.667), March 4, 1957, p. 1284.

He challenged a statement on innocent passage which had been made by Mr. Menon in the address previously referred to, that "first of all, one must prove innocence,"⁵⁴ by observing that:

This interpretation would nullify the rule of innocent passage, since it is obvious that, if it were valid, the littoral States would no longer have the duty of justifying their refusal of passage to a vessel on specific occasions and for specific reasons; rather, it would rest with the vessel to prove that its passage was innocent.⁵⁵

At the same meeting the delegate of The Netherlands stated that:

The Netherlands Government is in full agreement with the statements made by Israel, the United States, France and a number of other countries to the effect that passage through the Straits of Tiran should be free, open and unhindered for the ships of all nations. My Government bases its opinion on the following reasons:

First, inasmuch as the Gulf of Aqaba is bordered by four different States and has a width in excess of the three miles of territorial waters of the four littoral States on either side, it is, under the rules of international law, to be regarded as part of the open sea.

Secondly the Straits of Tiran consequently are, in the legal sense, straits connecting two open seas, normally used for international navigation.

Thirdly, in regard to such straits, there is a right of free passage even if the straits are so narrow that they fall entirely within the territorial waters of one or more States. This rule was acknowledged by the International Court of Justice in the Case of the Corfu Channel (Corfu Channel case, Judgment of Dec. 15, 1949: ICJ Reports, 1949, p. 244) and also by the International Law Commission in its report for 1956 (A/3159).

Fourthly, if a strait falls entirely within the territorial waters of one or more of the littoral States, there is still the right of innocent passage, but then the littoral States have the right, if necessary, to verify the innocent character of the passage.

Fifthly, this right of verification, however, does not exist in those cases where the strait connects two parts of the open sea.⁵⁶

The delegates of Belgium,⁵⁷ Sweden⁵⁸ and Denmark⁵⁹ stated support for the position that the Gulf has an international character and that its entrance constitutes an international waterway free to innocent passage of all shipping.

Mr. Pearson of Canada had suggested at the 660th Meeting of the General Assembly that "it should be agreed and affirmed by us that there should be no interference with innocent passage or any assertion of belligerent rights in the Straits of Tiran." He added at the 667th Meeting that "the Assembly should recommend and the parties should agree—as a political and not a legal act—that there should be no interference with the innocent passage of ships through the waters concerned."⁶⁰ In

⁵⁴ *Ibid.*, 665th Plenary Meeting (A/P.V.665), March 1, 1957, p. 1271.

⁵⁵ *Ibid.*, 667th Plenary Meeting (A/P.V.667), March 4, 1957, pp. 1287–1288.

⁵⁶ *Ibid.* 1288.

⁵⁷ *Ibid.* 1296.

⁵⁸ *Ibid.* 1303.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.* 1296. For earlier statement, see *ibid.*, 660th Plenary Meeting (A/P.V.660), Feb. 26, 1957, p. 1203.

earlier meetings it had been suggested by the delegates of Ceylon⁶¹ and Belgium⁶² that the question might properly be referred for a legal solution to the International Court of Justice. When Mr. Lall of India said at this meeting that "it has not been contended seriously that the General Assembly can settle a legal issue of this nature. . . . My delegation takes the view that it cannot possibly be settled here what the legal rights are in the Gulf of Aqaba and the Straits of Tiran,"⁶³ he was re-emphasizing a point made at an earlier meeting by his colleague, Mr. Krishna Menon.

On March 8, 1957, Secretary General Hammarskjöld announced that Israeli forces had that day evacuated Sharm al-Shaikh and Tiran Island.⁶⁴ The positions which they surrendered were occupied by a 250-man detachment of the United Nations Emergency Force (UNEF), consisting mostly of Finns, which assumed control of the Gulf's entrance under an agreement between the United Nations and the Government of Egypt, an agreement which would be terminated by arrangement between the Secretary General and the Government of Egypt.⁶⁵

A new element was added to the controversy by the entry of Saudi Arabia into the dispute. By letter of January 14, 1957, the Permanent Representative of Saudi Arabia, Shaikh Abdullah al-Khayyal, informed the Secretary General that since October 29, 1956, there had been a series of incidents whereby Israeli warships and military planes had assaulted Saudi Arabian positions near the mouth of the Gulf of Aqaba. He referred to specific instances as having taken place on January 5, 11 and 12, and stated that "the Saudi Arabian defense forces in the Aqaba Gulf have been under repeated instructions to refrain from being provoked to military action except in self-defense," and, suggesting that "the foregoing situation is likely to aggravate the maintenance of peace and security in the area," expressed the hope

that the United Nations, in order to enforce its resolutions and to fulfill its declared intention in preserving peace and security in the region, will be able to find the means to intervene in this matter.⁶⁶

On March 17, 1957, Mecca daily *Al-Bilad al-Saudiyyah* printed an official Saudi Arabian Government statement which asserted that the Gulf of Aqaba was not an international waterway, but rather a "closed Arab gulf," and that its waters constituted "Arab territorial waters." The statement further asserted that "the Saudi Arabian Government will never allow the establishment of any right of Israel in the Gulf of Aqaba." Reference was made in the statement to the Gulf as "a natural passage for

⁶¹ *Ibid.*, 644th Plenary Meeting (A/P.V.644), Jan. 28, 1957, p. 974.

⁶² *Ibid.*, 649th Plenary Meeting (A/P.V.649), Feb. 1, 1957, p. 1041.

⁶³ *Ibid.*, 667th Plenary Meeting (A/P.V.667), March 4, 1957, pp. 1301-1302.

⁶⁴ *Ibid.*, 668th Plenary Meeting (A/P.V.668), March 8, 1957, p. 1314.

⁶⁵ Barrett McGurn, "Guarding the Gulf of Aqaba," N. Y. Herald Tribune (European ed.), April 23, 1957, p. 4. See report of Secretary General on basic points for presence and functioning in Egypt of U.N.E.F. (U.N. Doc. A/3375), and Report of Secretary General on arrangements concerning status of U.N.E.F. in Egypt (U.N. Doc. A/3526).

⁶⁶ U.N. Doc. A/3499, Jan. 15, 1957.

the caravans of Muslim pilgrims going to the Holy Places" (Mecca and Medina). A few days earlier Mecca weekly *Hira* had contained two editorials which strongly denounced any attempt to give the Gulf an international status.

The March 17 statement was followed by a more elaborate statement in the circular note of March 31, referred to above.⁶⁷ This statement asserted that

the straits separating these two islands (Tiran and Sanafir) are under the control and jurisdiction of the Kingdom of Saudi Arabia. Likewise, the sea-water around those islands and straits are Saudi Arabian territorial waters. The above-mentioned straits were and still are locked . . . the straits of the Gulf of Aqaba may be by no means considered open straits. Any attempt to consider these straits as international straits will be regarded as an encroachment on the Saudi Arabian Kingdom and a threat to its integrity.

The note referred to Article 10, paragraph 3, of the Constantinople Convention of 1888, and suggested that

it appears, from the record of the negotiations which resulted in the conclusion of the Convention, that the inclusion of that provision, aimed at leaving the Gulf of Aqaba and its straits outside the scope of the order of the free passage defined for the Suez Canal . . . is an asserted recognition that the Gulf of Aqaba is a locked Arab Gulf without any international character, and that its waters together with the waters of the inlets and straits are territorial waters locked in the face of international navigation.⁶⁸

On March 29 Israeli Prime Minister Ben Gurion told a French newspaper correspondent that "any attempt by Egypt or Saudi Arabia to impose a blockade against Israeli shipping in the Gulf of Aqaba will oblige my country to exercise its right of self-defense."⁶⁹ Although, according to a BBC broadcast of March 6, the Israeli Prime Minister had stated that his government no longer regarded the Armistice Agreement with Egypt as being in force, other official Israeli pronouncements would seem to contradict this statement. While it is unclear whether or not Saudi Arabia has ever regarded itself as being at war with Israel, there is no doubt but that no armistice agreement ever was signed with Saudi Arabia, although such agreements were signed with Egypt, Jordan, Lebanon and Syria.

⁶⁷ Note 2¹ above.

⁶⁸ For text of Constantinople Convention, see 3 Moore's Digest 264-266; 3 A.M.I.L. Supp. 123 (1909).

By letter dated April 12, 1957, to the Secretary General, the Saudi delegate to the United Nations presented this point of view to that body. It was contained in an attached memorandum, which asserted that "the Gulf of Aqaba cannot be considered an open waterway and any attempt at giving it an international character will constitute an encroachment on the sovereignty of Saudi Arabia and a threat to its territorial security." The memorandum added that "Israeli planes and ships some four months ago attacked positions inside Saudi Arabia, at the time when Israel forces were occupying the Egyptian territory at Sharm al-Shaikh. This proves Israel intends to force a right of passage through the Gulf, threatening the security of the area." U.N. Doc.A/3575 (April 15, 1957), p. 3.

⁶⁹ N. Y. Herald Tribune (European ed.), March 30-31, 1957, p. 3.

Early in May, 1957, the Saudi Arabian Government addressed a circular note to the various Muslim missions in Jidda, and sent a letter to the Secretary General of the United Nations, wherein the complaint was made that on April 30 and May 1 an Israeli naval demonstration comprising Israeli warships had taken place in Saudi and Egyptian territorial waters in the Gulf of Aqaba. Several subsequent complaints also were made. The Israeli Government denied these allegations, and also denied that it had, as alleged, committed any act of interference with the Muslim pilgrimage, or had any intention of doing so.⁷⁰

During the June 8-13 visit of King Saud to King Husayn of Jordan, a joint *communiqué* was issued which stated that, since pilgrim travel from the port of Aqaba was unsafe because of the "aggression of Israel in this Arab Gulf," the two governments had decided to announce that travel by sea of pilgrims from the port of Aqaba was not desirable. At the end of the visit a concluding joint *communiqué* announced that the Gulf of Aqaba constitutes a "regional Arab water." The *communiqué* expressed the hope that all Muslim states would support this position. An article in *Al-Bilad al-Saudiyyah* of June 27, 1957, under the headline: "The Saudi Arabian Kingdom Emphasizes its Rights in the Waters of the Gulf of Aqaba," stated that a note had been sent to the United States Government in which "the right of the Saudi Arabian Kingdom to the Arab waters in the closed Gulf of Aqaba was emphasized," and in which the statement appeared that "Saudi Arabia does not recognize any right for non-Arab ships to pass through this Gulf and the straits leading thereto."⁷¹

In a July 4 address to visiting Muslim leaders in Mecca, on the occasion of the 1957 pilgrimage, King Saud emphasized the Saudi Arabian position

⁷⁰ Letter dated May 7, 1957, from the Permanent Representative of Saudi Arabia to the Secretary General, U.N. Security Council (S/3825, May 9, 1957). This was followed by several letters to the President of the Security Council, alleging Israeli naval and/or air demonstrations in Saudi territorial waters in the Gulf, as follows: May 27, 1957 (S/3833, May 28, 1957); June 5, 1957 (S/3835, June 6, 1957); June 19, 1957 (S/3841, June 20, 1957); June 24, 1957 (S/3843, June 25, 1957); July 2, 1957 (S/3846, July 2, 1957); and July 10, 1957 (S/3849, July 11, 1957).

By letter dated June 10, 1957, to the President of the Security Council, the Permanent Representative of Israel to the United Nations stated that:

"The Government of Israel has noted a series of complaints by Saudi Arabia alleging that Israel naval vessels have violated Saudi Arabian territorial waters and have attacked Saudi coastal positions along the shore of the Gulf of Aqaba, and that Israel military aircraft have circled over Saudi Arabian positions.

"The Government of Israel denies these allegations categorically. The incidents alleged have never taken place. Israel naval forces are under strict instructions not to violate the territorial waters of Saudi Arabia and not under any circumstances to attack other vessels or coastal positions. . . . Israel aircraft are under strict orders to respect the airspace of all other countries. . . . The Government of Israel, so far from interfering in any way with the traditional pilgrimage, has declared its desire to place all possible facilities at its disposal. . . . Never on a single occasion has Israel prejudiced the Mecca pilgrimage in any way, nor has she any intention of doing so." U.N. Doc. A/3838 (June 10, 1957), p. 1.

⁷¹ *Al-Bilad al-Saudiyyah*, June 13, 14, and 27. *Al-Bilad* of June 29 published the text of the note from Saudi Arabia to the United States Government.

on the Gulf of Aqaba, and asked the support of the Islamic world for that position. Saudi Arabia's position on the Gulf of Aqaba was again raised during the Twelfth Session of the General Assembly, on October 2, 1957, when the Saudi representative, Ahmad Shukairy, stated that:

The Gulf of Aqaba, basically, is not an international question. . . . The Gulf of Aqaba is a national inland waterway, subject to absolute Arab sovereignty. The geographical location of the Gulf is conclusive proof of its national character. It is separated from the Red Sea by a chain of islands, the largest being Sanafir and Tiran. The only navigable entrance—which, itself, is within Arab territory—does not exceed 500 metres. Thus, by its configuration, the Gulf is in the nature of a *mare clausum*, which does not belong to the class of international waterways. . . . The Gulf is so narrow that the territorial areas of the littoral States are bound to overlap among themselves, under any kind of measurement, even if we assume that the Gulf comprehends part of the high seas.

In the second place, the Gulf of Aqaba is of the category of historical gulfs that fall outside the sphere of international law. The Gulf is the historical route to the holy places in Mecca. Pilgrims from different Muslim countries have been streaming through the Gulf, year after year, for fourteen centuries. Ever since, the Gulf has been an exclusive Arab route under Arab sovereignty. It is due to this undisputed fact that not a single international authority makes any mention whatsoever of the Gulf as an international waterway open for international navigation.

It was last year, in the aftermath of aggression waged against Egypt, that the Gulf was claimed as comprehending an international waterway . . . Israel has not withdrawn from the Gulf . . . Israel warships, still in the Gulf, are one aspect of aggression. The resolution of November 2, 1956 calling for withdrawal of Israel behind the Armistice lines remains unimplemented as far as the Gulf is concerned.

Israel . . . has no right to any part of the Gulf. Israel's claim . . . could only be argued on the United Nations Plan of Partition or the Armistice lines. On either ground, the claim of Israel falls to the ground. On the plan of partition, Israel cannot claim Eilat before Israel is confined to the lines of the plan. . . . With regard to the armistice lines . . . under the express provisions of the armistice agreements, the armistice lines are purely "dictated" by "military considerations" and have no political significance.

Thus the area under Israel is nothing but a military control without sovereignty whatsoever. Israel has no sovereign status in the Gulf of Aqaba. Israel's position is one of aggression. . . .

Mr. Shukairy commented as follows with respect to suggestions that the legal status of the Gulf be submitted to the International Court of Justice for an opinion:

. . . our respect for the Court is unreserved and unlimited. But the matter is not to be decided exclusively on judicial grounds. The question involves matters of the highest order pertaining to pilgrimage and other national and political considerations. As a keeper of the Holy Places, His Majesty King Saud is not prepared to expose to question any matter touching upon the Holy shrines and the free passage of pilgrims to Mecca.

On innocent passage he remarked:

In spite of divergencies of opinion on every question falling within the province of international law, not a single legal precedent has declared a right of passage, innocent or otherwise, in a closed or inland water.⁷²

On March 3, 1958, during the first meeting of the First (Territorial Sea) Committee of the International Conference on the Law of the Sea at Geneva, Mr. Shukairy recorded a Saudi Arabian reservation that his country's participation in the conference "should never be construed as recognition of Israel in any nature whatsoever." He asked that a general article be inserted in the draft convention to the effect that the text applied only to the law in time of peace and not in time of war, and stated the position that peacetime rules such as innocent passage were inapplicable not only in case of open conflict, "but even when normal relations between two states do not exist. . . . When recognition is withheld or denied, it is inconceivable how the rights and duties as set out in the draft could be applied." Mr. Shukairy warned that the Arab states will insist on denying innocent passage to Israeli shipping in all Arab waters until the "genuine state of war" in the Middle East is ended.⁷³

Thus, while Israel and certain of the principal maritime Powers have expressed the position that the Gulf of Aqaba contains international waters, and that the Strait of Tiran is an international waterway through which the right of innocent passage exists for Israeli and all international shipping, Egypt and Saudi Arabia, in particular, have taken issue with this position. Saudi Arabia's position that the Gulf is an Arab *mare clausum* is, of course, most at variance with the views of those who regard it as having an international character.

Both Egypt and Saudi Arabia appear to regard Israel's possession of a five-mile strip on the Gulf as military possession without real sovereignty. On this question, it is clear that under the Palestine Partition Plan of November 29, 1947, Israel was awarded the southern Negev, including this coastline. Israel's advance into the area was made in early March, 1949, i.e., after the signing of the Egyptian-Israeli Armistice Agreement on February 24, 1949. It appears, however, that at this time there were no Egyptian, but only Jordanian, troops in the southern Negev area.⁷⁴ Consequently it may be argued that the Armistice Agreement with Egypt is irrelevant with respect to the southern Negev, since Egyptian troops were not committed there. The Jordan-Israel Armistice Agreement was signed on April 3, 1949,⁷⁵ after the advance to Elath had been completed. It provided, *inter alia*, that

in the sector from a point on the Dead Sea to the southernmost point of Palestine, the Armistice Demarcation line shall be determined by existing military positions as surveyed in March, 1949, by United Na-

⁷² General Assembly, 12th Sess., Official Records, 697th Plenary Meeting (A/P.V.697), Oct. 2, 1957, p. 233.

⁷³ N. Y. Herald Tribune (European ed.), March 4, 1958, p. 1.

⁷⁴ See note 32 above.

⁷⁵ See note 18 above.

tions observers, and shall run from north to south as delineated on Map 1 in Annex I of this Agreement.

The Armistice Demarcation line, as indicated on the map, follows the Wadi al-Aralah and hence the historic boundary between Palestine and Jordan. Consequently, in terms of the Armistice Agreements, a strong argument can be made for Israel's right to possession of its coastline on the Gulf of Aqaba. Just what is the legal nature of this possession, however, is somewhat unclear. As Mr. Pearson of Canada and Mr. Shukairy of Saudi Arabia have pointed out,⁷⁵ the Armistice Agreements are not to be construed as establishing political or territorial boundaries, or to prejudice or confirm any political or territorial right or claim or boundary, and were delineated without prejudice to rights, claims and positions of the parties as regards an ultimate settlement of the Palestine question.⁷⁶ Mr. Shukairy has suggested that Israel should not be permitted to claim the Negev area until it has complied with the original Palestine Partition Plan, which would involve giving up certain other areas which were to have been Arab under that plan.⁷⁶ This point may have an important bearing upon any legal decision made with respect to the Gulf's status by an appropriate authority.

Egypt and Israel appear to differ on the nature of the Egyptian-Israeli Armistice Agreement. On the general question of an armistice agreement, the British jurist, Sir Hersch Lauterpacht, has stated:

Armistices or truces, in the wider sense of the term, are all agreements between belligerent forces for a temporary cessation of hostilities. They are in no wise to be compared to peace . . . because the condition of war remains between the belligerents themselves, and between belligerents and neutrals, on all points beyond the mere cessation of hostilities . . . the right of visit and search over neutral merchantmen therefore remains intact as does likewise the right to capture neutral vessels attempting to break a blockade and the right to seize contraband of war . . .

A general armistice is a cessation of hostilities which, in contradistinction to suspension of arms with their momentary and local military purposes, is agreed upon between belligerents for the whole of their forces, and the whole region of war . . .

Everybody agrees that belligerents during an armistice may, *outside the line where the forces face each other*, do everything and anything they like regarding defense and preparation of offense.⁷⁹

The American publicist, Charles Cheney Hyde, quotes the United States War Department Rules of Land Warfare of 1940 as defining an armistice to mean "the cessation of active hostilities for a period agreed upon by

⁷⁵ See remarks of Mr. Pearson, General Assembly, 11th Sess., Official Records, 660th Meeting (A/P.V.660), Feb. 26, 1957, p. 1203, and remarks of Mr. Shukairy, *ibid.*, 12th Sess., 697th Plenary Meeting (A/P.V.697), Oct. 2, 1957, p. 233.

⁷⁶ See Art. IV, par. 3, and Art. V, par. 2, of the Egyptian-Israeli Armistice Agreement, and Art. II, par. 2, of the Jordan-Israeli Armistice Agreement. The former Agreement is cited in note 9 above; the latter in note 18 above.

⁷⁷ A/P.V.697, *op. cit.* 233.

⁷⁸ 2 Oppenheim, International Law: Disputes, War and Neutrality 546-551 (7th ed., 1952, Sir H. Lauterpacht).

tween belligerents." He refers to the Hague Regulations as defining armistices as "a class of agreements purporting to suspend military operations," and observes that Article 37 of such regulations states that "general armistices . . . usually precede the negotiations for peace, but may be concluded for other purposes."⁸⁰ Hyde's general position appears to be that an armistice agreement is entered into in contemplation of, or as a first step towards, the conclusion of a treaty of peace, but is not a substitute therefor.

In a recent article entitled "The Nature and Scope of the Armistice Agreement,"⁸¹ Colonel Howard S. Levie observes that "it may be stated as a positive rule that an armistice agreement does *not* terminate the state of war existing between the belligerents, either *de jure* or *de facto*, and that the state of war continues to exist and to control the actions of neutrals as well as belligerents."⁸² On the specific question of the Arab-Israeli armistice agreements, Colonel Levie states that:

Israel complained to the Security Council asserting that the four armistice agreements (with Egypt, Jordan, Syria and Lebanon) had, in effect, terminated the state of war between all the belligerent parties. Egypt, on the other hand, contended that the state of war continued despite the armistice agreements and that the blockade (of the Suez Canal and later of the Gulf of Aqaba) was legal. The Security Council on September 1, 1951, passed a resolution calling upon Egypt to lift its blockade. (Security Council, Sixth Year, *Official Records*, 558th Meeting). This action of the Security Council has been construed as indicating that a general armistice is a kind of *de facto* termination of war. It is considered more likely that the Security Council's action was based upon a desire to bring to an end a situation fraught with potential danger to peace than that it was attempting to change a long established rule of international law. By now it has surely become fairly obvious that the Israeli-Arab General Armistice Agreement did not create even a *de facto* termination of the war between those states.⁸³

Colonel Levie adds that "it is apparent that the failure, in an appropriate case, to include within an armistice a clear provision with regard to naval blockade, and naval warfare generally, can be the cause of serious difficulties and, perhaps, even of the resumption of hostilities." After citing examples, including the Israeli-Egyptian Armistice Agreement, Colonel Levie observes that "the foregoing discussion has, it is believed, indicated the necessity of including in an armistice agreement specific and precise provisions with regard to naval warfare, blockades, etc."⁸⁴ He observes a trend, however, whereby the armistice agreement is becoming more final in character.⁸⁵

⁸⁰ 3 Hyde, *International Law, Chiefly as Interpreted and Applied by the United States* 1783 (1945 ed.). The Hague Regulations were annexed to the Hague Convention of 1907 respecting the Law and Customs of War on Land, 2 Malloy's *Treaties* 2287.

⁸¹ 50 A.J.I.L. 880-906 (1956).

⁸³ *Ibid.* 886.

⁸² *Ibid.* 884.

⁸⁴ *Ibid.* 904, 906.

⁸⁵ *Ibid.* 906. In this connection see the address made by Department of State Legal Adviser, Herman Phleger, at the 49th Annual Meeting of the American Society of International Law, April 29, 1955, wherein he observed, referring to the Korean

A "Special Correspondent" of *The Times* of London, in a recent article, has taken a contrary position with respect to the Egyptian-Israel Armistice Agreement.⁸⁶ He has observed that:

... the armistice operated to deprive Egypt of any continued right to blockade Israel or to interfere with foreign vessels bound for Israel. Normally ... an armistice agreement does not operate to terminate the legal state of war. It is also arguable that an armistice does not even put an end to the rights of the belligerents to visit and search neutral vessels or to seize contraband and to enforce a blockade. The armistice merely ends hostilities between the armed forces of the belligerents. In all the circumstances of the dispute between Egypt and Israel, however, it seems probable that the armistice agreement did more than this.

The correspondent has relied primarily upon the Security Council resolution of September 1, 1951, to uphold his thesis that the Armistice Agreement operated to deny the exercise of belligerent rights at sea.⁸⁷ He has concluded that:

This resolution of the Security Council creates for Egypt a legal obligation which she is not free to disregard. It will be noted that the resolution does not purport to be based so much on the special status of the Suez Canal as on the provisions of the armistice agreement. This being so, the situation resulting from the armistice would equally negative the claim of Egypt to exercise belligerent rights in the Straits of Tiran.

The Canadian lawyer, Bloomfield, in his recent book on the Gulf of Aqaba, concludes that:

Armistice Agreement, that it was "more like a treaty of peace than an armistice agreement. But that seems to be the style now. The armistice terminating hostilities between Israel and the surrounding countries, and that concluding the Indo-China hostilities, are of the same nature." 1955 Proceedings, American Society of International Law 98.

⁸⁶ March 8, 1957, p. 11.

⁸⁷ The writer cited the resolution, the particularly relevant sections of which are as follows:

"The Security Council. . . Considering that since the Armistice regime . . . of a permanent character, neither party can reasonably assert that it is actively a belligerent or requires to exercise the right of visit, search and seizure for any legitimate purpose of self-defense;

"Finds that the maintenance of the practice mentioned . . . is inconsistent with the establishment of permanent peace in Palestine;

"Finds further that such practice is an abuse of the exercise of the right of visit, search and seizure;

"Further finds that the practice cannot in the prevailing circumstances be justified on the grounds that it is necessary for self-defense;

"And further noting that . . . sanctions applied by Egypt to certain ships which have visited Israel ports represent unjustified interference with the rights of nations to navigate the seas . . . ;

"Calls upon Egypt to terminate the restrictions on the passage of international commercial shipping and goods through the Suez Canal wherever bound. . . ." U.N. Doc. S/L322.

No state of war existed or exists between Egypt and Israel by virtue of the fact that both are members of the United Nations Organization, and such a state of war is . . . incompatible with the obligations and duties of member states. Egypt is not entitled to exercise belligerent rights in the Gulf of Aqaba or elsewhere.⁸⁸

Thus conflicting persuasive arguments have been advanced with respect to the nature of the Egyptian-Israeli Armistice Agreement insofar as it has a bearing upon freedom of passage for Israeli shipping in the Gulf of Aqaba. It is submitted that a definitive determination of this question may be important to any final determination of Israel's status with respect to use of the Gulf. There would seem to be no question but that the right of passage through an international waterway which lies within the territorial sea is affected by a state of war. Consequently, if Egypt and Israel are at war, and if the Rhodes General Armistice Agreement of February 24, 1949, does not have a special character which makes it more final than the traditional armistice agreement, a statement contained in a recent study on passage of ships through international waterways in wartime would be particularly relevant. Professor Baxter states the following:

The practices followed by states would seem to indicate that the recognition of any right of passage through international waterways for enemy warships when the littoral state is a belligerent would be altogether unthinkable. No more can it be expected that littoral states should deny themselves the opportunity of visiting, searching and seizing merchant ships passing through the waterway. The corresponding right of neutral warships and innocent merchant vessels to make use of the waterway must, under modern conditions, take second place to the legitimate need of the littoral state to defend itself and to derive strategic advantage from its control of the waterway. However, international law must require that the authority of the littoral state be exercised reasonably and with due regard to the seriousness of the danger anticipated.⁸⁹

Having discussed questions raised with respect to Israeli shipping in the Gulf by the possible existence of a state of war, we may turn to a consideration of the legal status of the Gulf under the ordinary rules of international law, i.e., the law in effect in time of peace, and the bearing of these rules upon the Saudi Arabian position that the Gulf has the status of a closed water area, an Arab *mare clausum*.

Two of the conventions prepared by the United Nations Conference on the Law of the Sea which met at Geneva, February 24-April 27, 1958,⁹⁰ the Convention on the Territorial Sea and the Contiguous Zone, and the Convention on the High Seas, would seem to provide a useful point of

⁸⁸ Bloomfield, *op. cit.* 164.

⁸⁹ R. R. Baxter, "Passage of Ships Through International Waterways in Time of War," 31 Brit. Year Book of Int. Law 187-216, at 208 (1954).

⁹⁰ See article on the Conference by Arthur H. Dean, above, p. 607. The Conference was unable to reach agreement on the breadth of the territorial sea. One of the resolutions, adopted by the Conference on April 27, 1958, requests the U.N. General Assembly to study, at its 13th session (1958), the advisability of convening a second international conference of plenipotentiaries to consider further this question and other questions left unsettled by the Conference (A/CONF.13/L.56, April 30, 1958, p. 9).

departure for such consideration, inasmuch as they appear to represent the best consensus of present international opinion regarding the law of the sea. Since the problem of multinational bays was not dealt with by the Conference, resort will necessarily be made to other authorities on that question.

The threefold classification of water areas is clearly stated in Article 1 of the Convention on the High Seas, which reads: "The term high seas means all parts of the sea that are not included in the territorial sea or the internal waters of a state."⁹¹ This threefold classification, according to H. A. Smith, "begins from the land outwards and obviously requires the delimitation of two lines—the line which divides internal from territorial waters, and the line between the territorial belt and the high seas."⁹²

The Conference was unable to reach agreement on the breadth of the territorial sea. However, it has provided a method for drawing the baseline from which the breadth of the territorial sea can be measured. This baseline, according to Article 3 of the Convention on the Territorial Sea, is normally "the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State." Article 4, however, provides also the possibility of employing straight baselines "where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity," provided that "the drawing of such baselines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters," and that "the system of straight baselines may not be applied by a State in such a manner as to cut off from the high seas the territorial sea of another State."⁹³

Article 6 of the Territorial Sea Convention provides that:

The outer limit of the territorial sea is the line every point of which is at a distance from the nearest point of the baseline equal to the breadth of the territorial sea.⁹⁴

Article 5 provides that:

1. Waters on the landward side of the baseline of the territorial sea form part of the internal waters of the State.

2. When the establishment of a straight baseline in accordance with Article 4 has the effect of enclosing as internal waters areas which previously had been considered as part of the territorial sea or of the high seas, a right of innocent passage, as provided in Articles 14 to 23, shall exist in those waters.⁹⁵

Article 12 provides that:

1. Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between

⁹¹ A/CONF. 13/L.53 (April 29, 1958), p. 2.

⁹² H. A. Smith, *The Law and Custom of the Sea* 6 (2nd ed., N. Y., 1950).

⁹³ A/CONF. 13/L.52, p. 2.

⁹⁴ *Ibid.*, p. 3.

⁹⁵ *Ibid.*, pp. 2-3.

them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the States is measured. The provisions of this paragraph shall not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance with this provision.

2. The line of delimitation between the territorial seas of two States lying opposite to each other or adjacent to each other shall be marked on large-scale charts officially recognized by the coastal States.⁹⁶

The legal status of the territorial sea, and, by inference, that of internal waters, is set forth in Article 1 of the Convention, which reads as follows:

1. The sovereignty of a State extends, beyond its land territory and its internal waters, to a belt of sea adjacent to its coast, described as the territorial sea.

2. This sovereignty is exercised subject to the provisions of these articles and to other rules of international law.⁹⁷

One of the principal limitations imposed by international law upon the coastal state's sovereignty over the territorial sea is the right of innocent passage. This right is accorded in the interest of freedom of navigation and may be described as broadly analogous to the common law easement with respect to land.⁹⁸ Articles 14 through 23 of the Convention on the Territorial Sea deal with various aspects of this right. Articles 14 through 17 are applicable to *all* ships. The provisions of these articles which seem most relevant to the present discussion are the following:

Article 14

1. Subject to the provisions of these articles, ships of all States, whether coastal or not, shall enjoy the right of innocent passage through the territorial sea.

.

4. Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with these articles and with other rules of international law.

Article 15

1. The coastal State must not hamper innocent passage through the territorial sea.

Article 16

1. The coastal State may take the necessary steps in its territorial sea to prevent passage which is not innocent.

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3. Subject to the provisions of paragraph 4, the coastal State may, without discrimination amongst foreign ships, suspend temporarily in

⁹⁶ *Ibid.*, p. 5.

⁹⁷ *Ibid.*, p. 1. Article 2 adds that: "The sovereignty of a coastal State extends to the air space over the territorial sea as well as to its bed and subsoil." *Ibid.*

⁹⁸ See Smith, *op. cit.* 33-37; and C. B. Selak, Jr., "Fishing Vessels and the Principle of Innocent Passage," 48 A.J.I.L. 627 (1954).

specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security. Such suspension shall take effect only after having been duly published.

4. There shall be no suspension of the innocent passage of foreign ships through straits which are used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign State.

Article 17

Foreign ships exercising the right of innocent passage shall comply with the laws and regulations enacted by the coastal State in conformity with these articles and other rules of international law and, in particular, with such laws relating to transport and navigation

Article 23, applicable to warships, states that:

If any warship does not comply with the regulations of the coastal State concerning passage through the territorial sea and disregards any request for compliance which is made to it, the coastal State may require the warship to leave the territorial sea.⁹⁹

The legal status of the high seas is set forth in Article 2 of the Convention on the High Seas, as follows:

The high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty. Freedom of the high seas is exercised under the conditions laid down by these articles and by the other rules of international law. It comprises, *inter alia*, both for coastal and non-coastal States:

- (1) Freedom of navigation;
- (2) Freedom of fishing;
- (3) Freedom to lay submarine cables and pipelines;
- (4) Freedom to fly over the high seas.

These freedoms, and others which are recognized by the general principles of international law, shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas.¹⁰⁰

Thus the regime of the high seas, as Smith has observed, is subject to international law alone, and national authority exercised thereon must conform to international custom or convention.¹⁰¹ "As the high seas are a territory of the international community, the right of regulation must be exercised by the international community."¹⁰²

Article 24 of the Convention on the Territorial Sea and the Contiguous Zone deals with the latter, and makes it clear that this zone is a part of the high seas. It states:

1. In a zone of the high seas contiguous to its territorial sea, the coastal State may exercise the control necessary to:

⁹⁹ A/CONF. 13/L. 52, pp. 5-9.

¹⁰⁰ A/CONF. 13/L. 53, p. 2.

¹⁰¹ *Op. cit.* 45-46 *et seq.*

¹⁰² Josef L. Kunz, "Continental Shelf and International Law: Confusion and Abuse," 50 A.J.I.L. 828, 829 (1956), citing C. John Colombos, *The International Law of the Sea* 56 (3rd ed., London, 1954).

(a) Prevent infringement of its customs, fiscal, immigration or sanitary regulations within its territory or territorial sea;

(b) Punish infringement of the above regulations committed within its territory or territorial sea.

2. The contiguous zone may not extend beyond twelve miles from the baseline from which the breadth of the territorial sea is measured.

3. Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its contiguous zone beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of the two States is measured.¹⁰³

The Conference on the Law of the Sea did not attempt to codify the law with respect to multinational bays. Article 7 of the Convention on the Territorial Sea and the Contiguous Zone provides that: "This article relates only to bays the coasts of which belong to a single state." After defining a bay as "a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain land-locked waters and constitute more than a mere curvature of the coast," it states that:

Where the distance between the low-water marks of the natural entrance points of a bay does not exceed twenty-four miles, a closing line may be drawn between these two low-water marks, and the waters enclosed thereby shall be considered as internal waters.

The article adds that: "The foregoing provisions shall not apply to so-called 'historic bays.'"¹⁰⁴ One of the resolutions of the conference, however, adopted on April 27, 1958, deals with the "Regime of Historic Waters." It reads as follows:

The United Nations Conference on the Law of the Sea,
Considering that the International Law Commission has not provided for the regime of historic waters, including historic bays,
Recognizing the importance of the juridical status of such areas,
Requests the General Assembly of the United Nations to arrange for the study of the juridical regime of historic waters, including historic bays, and for the communication of the results of such study to all States Members of the United Nations.¹⁰⁵

The Report of the International Law Commission covering the work of its Eighth Session, April 23-July 4, 1956, which was one of the bases for the discussion of the conventions prepared by the Conference on the Law of the Sea, stated, in the commentary to Article 7, that "the Commission felt bound to propose only rules applicable to bays the coasts of which belong to a single state. As regards other bays, the Commission had not sufficient data at its disposal concerning the number of cases involved or the regulations at present applicable to them."¹⁰⁶ The Report also observed, in the commentary to Article 26, that:

Some large stretches of water, entirely surrounded by dry land, are known as "lakes," others as "seas." The latter constitute in-

¹⁰³ A/CONF. 13/L. 52, p. 9.

¹⁰⁴ *Ibid.*, pp. 3-4.

¹⁰⁵ A/CONF. 13/L. 56, p. 8.

¹⁰⁶ See 51 A.J.I.L. 186-188 (1957).

ternal seas, to which the regime of the high seas is not applicable. Where such stretches of water communicate with the high seas by a strait or arm of the sea, they are considered as "internal seas" if the coasts, including those of the waterway giving access to the high seas, belong to a single state. If that is not the case, they are considered as high seas. These rules may, however, be modified for historical reasons or by international arrangement.¹⁰⁷

X/ The generally accepted principle with respect to gulfs and bays surrounded by the territories of more than one state has been set forth by Judge Lauterpacht as follows:

... as a rule, all gulfs and bays enclosed by the land of more than one littoral state, however narrow their entrance may be, are non-territorial. They are parts of the open sea, the marginal belt (territorial sea) inside the gulfs and bays excepted. They can never be appropriated; they are in time of peace and war open to vessels of all nations, including men-of-war, and foreign fishing vessels cannot, therefore, be compelled to comply with municipal regulations of the littoral state concerning the mode of fishing.¹⁰⁸

Sir Cecil Hurst has pointed out that "so-called gulfs and bays are often parts of the high seas," the descriptive title having no necessary bearing upon water areas under international law.¹⁰⁹ It is suggested, therefore, that in the light of Judge Lauterpacht's comments cited above, the International Law Commission's commentary regarding modification of rules regarding "lakes" and "seas" for "historical reasons or by international arrangement"¹¹⁰ would be applicable equally to "gulfs" and "bays."

All gulfs and bays may be classified as either "territorial" or "non-territorial," the former consisting of internal waters of the coastal state, for normally only one state is involved, and the latter comprising a part of the high seas.¹¹¹ By these criteria the Gulf of Aqaba would appear to be non-territorial in character, with respect to which each coastal state possesses a belt of territorial sea, but which, as an entity, with the exception of such belts, would be a part of the high seas. Do historical or other considerations modify such status for the Gulf? The Saudi Arabian Government's position appears essentially to imply that the waters of the Gulf are internal waters of several Arab coastal states, either on the basis

¹⁰⁷ *Ibid.* 205.

¹⁰⁸ 1 Oppenheim, *International Law: Peace* 460-461 (7th ed., H. Lauterpacht, 1948).

¹⁰⁹ "The Territoriality of Bays," 3 *Brit. Year Book of Int. Law* 42-54, at 49 (1922-23).

¹¹⁰ Note 107 above.

¹¹¹ See Report of the International Law Commission, *loc. cit.*, Art. 7, 51 A.J.I.L. 186-188 (1957).

Judge Lauterpacht has pointed out that: "The expression 'territorial bay' must not be allowed to obscure the facts (1) that the waters contained in territorial bays, and in the territorial portions of bays not entirely territorial, are not territorial waters and part of the maritime belt (territorial sea), but national (internal) waters, and (2) that the limit of the national waters is the datum line for the measurement of the maritime belt." Oppenheim-Lauterpacht, *op. cit.* 458, footnote.

Perhaps a more useful term for bays referred to as "territorial bays" would be "internal bays," and for bays referred to as "non-territorial bays," "open bays."

of joint control or agreed distribution of such waters. Leaving aside for the moment the problem with respect to Israel's connection with the Gulf, can justification be found for the Saudi Arabian position? The American authority, Charles Cheney Hyde, has made the following comment relevant to this matter:

Bays Bordered by Land Belonging to Two or More States.

When the geographical relationship of a bay to the adjacent or enveloping land is such that the sovereign of the latter, if a single state, might not unlawfully claim the waters as a part of its territory, it is not apparent why a like privilege should be denied to two or more states to which such land belongs, at least if they are so agreed, and accept as between themselves a division of the waters concerned. No requirement of international law as such deprives them of that privilege, notwithstanding the disposition of some who would leave little room for its application.¹¹²

The Harvard Draft Convention on Territorial Waters of 1929, George Grafton Wilson, Reporter, made the following comment in Article 6:

Where the waters within the seaward limit are bordered by two or more states, it would seem that the bordering states should be permitted by international law to divide such waters between them as inland waters. If the same waters are bordered by one state only, that state would clearly be entitled, under Article 5, to treat all of the waters as inland waters. The power of two or more states should not be smaller than the powers of one state in this respect if the states can reach an agreement.¹¹³

Dr. Hyde has drawn attention to the Gulf of Fonseca decision, which appears to be the only instance in which a court has held that a bay or gulf surrounded by the territory of more than one coastal state is "territorial" in nature and an "historic bay" or "closed sea." The Gulf, situated on the west coast of Central America, is enclosed by three states, Nicaragua, Honduras and El Salvador. In *El Salvador v. Nicaragua*, suit was brought in the Central American Court of Justice¹¹⁴ to nullify a Nicaraguan grant to the United States, under the Bryan-Chamorro Treaty of August 4, 1914, of "the right to establish, operate and maintain a naval base at such place on the territory of Nicaragua bordering upon the Gulf of Fonseca as the Government of the United States may select." El Salvador argued that the Gulf was the subject of joint or community ownership, while Nicaragua asserted that its waters were apportioned among the three coastal states on the basis of an extension of the lines marking the national land boundaries. Both states agreed that it was a "closed sea."

¹¹² 1 Hyde, *International Law, Chiefly as Interpreted and Applied by the United States* 475 (2nd rev. ed., Boston, 1945).

¹¹³ 23 A.J.I.L. Spec. Supp. 274 (1929).

¹¹⁴ Established by the Central American States by the Convention of Dec. 20, 1907. 1 Hackworth's Digest 702; 2 A.J.I.L. Supp. 231 (1908).

In its judgment of March 9, 1917, the Court held the Gulf of Fonseca to be "an historic bay possessed of the characteristics of a closed sea." The rationale of the decision was: (1) The coastal states "had exercised immemorial possession accompanied by dominion both peaceful and continuous and by acquiescence on the part of other nations, from 1522 to 1821, when all were ruled by Spain, from 1821 to 1839, when all formed part of the Federal Republic of the Center of America, and from 1839 to the time of the decision, when they formed separate political entities . . . that . . . exclusive ownership has been exercised over the waters of the Gulf during the course of nearly 400 years is incontrovertible"; (2) the size and special geographic configuration of the Gulf "which safeguards so many interests of vital importance to the economic, commercial, agricultural and industrial life of the riparian states"; and (3) the necessity that the coastal states possess the Gulf in accordance with these interests and that of national defense. The Court decided that with the exception of a three-mile belt of territorial sea along the coast of each state, the three coastal states possessed the waters of the Gulf as joint owners. Honduras and Nicaragua objected to the concept of community of ownership, claiming that the Gulf was a "closed sea" on the basis of divided ownership of all the waters therein.¹¹⁵ No instances of protest with respect to the closed-sea claims of the three littoral states are known.

During the General Assembly's consideration of Israeli withdrawal from the entrance to the Gulf of Aqaba in early 1957, Mr. Urquia of El Salvador alluded to the Gulf of Fonseca. He cited a comment he had made at Mexico City in 1956 to the Inter-American Council of Jurists on this question, in which, *inter alia*, he had stated the following:

. . . The Gulf or Bay of Fonseca belongs to the category of bays known in international law as historical bays, and is therefore subject to the exclusive sovereignty of the coastal State or States, regardless of the distance or length to which it penetrates inland or its width at the mouth, provided that, as is the case for the Gulf of Fonseca, the coastal States have asserted and assert their sovereignty for reasons based on their geographical situation, their use of the Gulf for centuries, and above all, their self-defense.

Mr. Urquia added that the position of the Salvadorean Government had become known as the "Meléndez doctrine," from the name of the then President of El Salvador, and stated that

the doctrine provides that when an arm of the sea occupies the space between two or more countries, the area of the waters *inter fauces terrae* is necessarily within the joint jurisdiction of the coastal States.

¹¹⁵ *Anales de la Corte de Justicia Centroamericana* (1916-1917), Vols. V, VI and VII; 11 A.J.I.L. 674-730 (1917); P. C. Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* 398-410 (N. Y., 1927).

Judge Lauterpacht has cautioned that the decision has force only with respect to the three states concerned, and has observed that while the United States appears to have acknowledged the territorial character of the Gulf, the attitude of other states is not known. *Op. cit.* 460-461, footnote 6.

He concluded by remarking that he had made this statement "as a kind of reservation with respect to what has been said here regarding the case of the Gulf of Aqaba and the Straits of Tiran."¹¹⁶ ✓

✓ Can the Gulf of Fonseca case be regarded as a precedent to be applied to the Gulf of Aqaba? Geographically, the two water areas are approximately of similar size and restricted configuration.¹¹⁷ Historically, the Gulf of Aqaba was Arab in character from approximately 700 A.D. until 1517; under Ottoman control during the period of Ottoman suzerainty over the surrounding Arab lands from 1517 until the end of World War I; and under the control of the present littoral Arab states from approximately the end of the war to the present, with mandated Palestine until 1948 occupying the coastline now controlled by Israel. The Gulf undoubtedly has strategic and defensive importance to the coastal Arab states. In addition, it has been for many centuries and remains an avenue for pilgrim traffic proceeding to the yearly Muslim pilgrimage at Mecca and Medina, although not so important as it was before the days of air travel. Some Arab authorities appear to regard the inclusion of Article 10, paragraph 3, in the Constantinople Convention of 1888 as designed to retain for the Ottoman Government a free hand in protecting the pilgrim route. These authorities seem to interpret this provision as lending support to the Saudi Arabian claim that the Gulf is a "locked Arab Gulf, without any international character."¹¹⁸

Although the Gulf of Aqaba was under Arab or Ottoman (and Islamic) control for approximately 1200 years, no formal closed-sea claim appears ever to have been made until that asserted by the Saudi Arabian Government early in 1957. However, obviously international law in its present sophisticated form did not exist throughout most of that period. In addition, it is likely that there was no need of that assertion of such a claim; foreign Powers probably were not interested in navigation in the Gulf, since it apparently had no commercial importance to them. The question of the Gulf's status might not have arisen at this time except for the fact of Arab hostility toward Israel, and the additional fact that the presence of the UNEF contingent at the entrance to the Gulf now renders Egyptian measures against Israeli shipping futile.

No precision appears to have been given to Saudi Arabia's closed-sea claim, for no agreement appears to have been reached among the three Arab littoral states to provide either for joint control of the Gulf's waters or for an apportionment thereof. ✓

Further, both Egypt and Saudi Arabia, by their territorial sea legislation,¹¹⁹ claim respectively six miles of territorial sea along their coastlines

¹¹⁶ General Assembly, 11th Sess., Official Records, 666th Plenary Meeting (A/P.V. 666), March 1, 1957, p. 1281.

¹¹⁷ The Gulf of Fonseca is approximately 50 miles in length and 30 in breadth. The distance between headlands is approximately 19 1/3 miles, although islands at the entrance reduce the distance to 8 miles, or 4 miles, if the Farallon Islands are considered to be the Nicaraguan boundary of the Gulf.

¹¹⁸ Note 68 above.

¹¹⁹ Notes 23 and 24 above.

in the Gulf, and an additional six-mile zone of contiguous waters. Although the Court in the *Gulf of Fonseca* case envisaged a situation in which a closed sea could have a belt of territorial sea along the coasts of the several states, the remainder of the waters being held jointly as internal waters, such a situation does not normally prevail. Ordinarily, the presence of a zone of territorial sea implies that a water area is essentially a part of the high seas. A zone of territorial sea interposes itself between the coast or the zone of internal waters, and the high seas; when a coastal incursion consists of internal waters in its entirety, the territorial sea begins seaward of a line drawn from headland to headland. A contiguous zone, according to the Convention on the Territorial Sea and the Contiguous Zone, cited above, is a part of the high seas.¹²⁰ Consequently, in spite of the existence of factors pointing to a close parallel between the Gulfs of *Fonseca* and *Aqaba*, the closed-sea claim of Saudi Arabia does contain basic weaknesses.¹²¹

Perhaps it is not the thought of the Saudi Arabian Government that the Gulf of *Aqaba* be considered in its entirety internal waters of the surrounding Arab states. The fact that large areas of waters in the Gulf, as well as the waters of the entrances to the Gulf, are territorial sea of Egypt or Saudi Arabia, may have inspired the concept that the Gulf is a closed sea. If this is the rationale of the Saudi Arabian position, however, it must be borne in mind that under the international law of peace the right of innocent passage exists with respect to the territorial sea.¹²² This right, accordingly, could legally be claimed by all states not at war with the coastal states.

The Gulf of *Fonseca* situation appears to be unique. Water areas surrounded by the territory of a single coastal state, and thus having the status of "closed seas," which subsequently, because of political changes resulting in the establishment of more than one state on their shores, become multinational in character, generally have come to be regarded as essentially parts of the high seas, regardless of the narrowness of their entrances. Special treaty arrangements, however, usually have been necessary to establish this character.

The Black Sea is a case in point. It was a Turkish lake from 1484, when the Ottoman Empire completed the conquest of its entire littoral, until 1774, when, in accordance with provisions of the Treaty of *Kutchuk Kainarj*, Russia secured a foothold on its northern coast.¹²³ By that treaty not only was Russia recognized as a Black Sea littoral state, but also obtained freedom of navigation—although to some extent limited—in the

¹²⁰ Note 103 above; p. 840 below.

¹²¹ The London Times Special Correspondent, cited above, note 86, has observed with respect to the closed-sea argument: "At a time when the whole area was subject to Turkish sovereignty, this argument might have been tenable. This is no longer the case. The Gulf is enclosed by the shores of four independent states—Egypt, Israel, Jordan, and Saudi Arabia."

¹²² See notes 98 and 99 above.

¹²³ Erik Brüel, *International Straits*, Vol. II, pp. 265-266 (Copenhagen and London 1947).

Black Sea, and a corresponding right of passage through the Turkish Straits.¹²⁴ According to Hurewitz, the treaty "converted the Black Sea from an exclusively Ottoman lake into a Russo-Ottoman lake. It assured Russian commercial vessels unrestricted navigation in that sea and free passage through the Straits."¹²⁵ Between 1774 and 1806 the Ottoman Empire entered into a series of treaties with European Powers which provided for free navigation through the Straits by commercial vessels. A treaty of May 7, 1830, between the Ottoman Empire and the United States declared that "merchant vessels of the United States, in like manner as vessels of the most favored nation," should have liberty to enter the Black Sea through the Straits. Nothing was said regarding warships.¹²⁶ By the Treaty of Adrianople of September 21, 1829, Russia succeeded in having removed the last restrictions on the passage of its merchant vessels through the Straits. By this treaty, according to Brüel, the Ottoman Empire "undertook *expressis verbis* an obligation which was already in existence," and by 1914 the right of passage for merchant vessels through the Straits was an established rule of international law.¹²⁷

At the present time the Montreux Convention of July 20, 1936,¹²⁸ governs the regime of the Turkish Straits. It provides "freedom of transit and navigation by sea in the Straits . . . without limit of time" for all merchant vessels in time of peace, and in time of war when Turkey is not a belligerent. When Turkey is at war, merchant vessels of states not at war with Turkey enjoy the right on condition that they do not assist the enemy, and pass by day through channels indicated by the Turkish authorities. The passage of warships both in times of war and peace is much more restricted, and when Turkey is at war or in imminent danger of war, is entirely at the discretion of the Turkish Government.¹²⁹

Eric Brüel, in his study of international straits, has expressed the opinion that

the fact that a legal status *sui juris* has been created for international straits in general and that regimes more or less logical have been established for particularly important straits has shown that strong normative forces are at work in this sphere . . . the direction of that development, although neither clear nor even, is at any rate not doubtful when viewed over long periods. This applies not merely to the general rules of international law relating to international straits but also in principle to the special regimes which have now been created, from the Sound Treaty with its purely negative abolition of

¹²⁴ *Ibid.* 271.

¹²⁵ J. C. Hurewitz, *Diplomacy in the Near and Middle East*, Vol. I, p. 54 (Princeton, 1956). For text of treaty, see *ibid.* 54-61.

¹²⁶ 1 Moore's Digest 665.

¹²⁷ Brüel, *op. cit.* 291-295. On the regime of the Turkish Straits, see also Higgins and Colombos, *The International Law of the Sea* 142-146 (2nd rev. ed., 1951, by C. John Colombos).

¹²⁸ 7 International Legislation 386-399 (1941); Hurewitz, *op. cit.*, Vol. II, pp. 197-203; 173 League of Nations Treaty Series 213-241 (1936-37); 31 A.J.I.L. Supp. 1 (1937).

¹²⁹ *Ibid.*, and Brüel, *op. cit.* 388-424.

a power exercised by the coastal state against the interests of the international community, to the Montreux Convention with its emphasis on the fact that special rights were granted to the coastal state not in its own interest alone but also in that of the international community . . . the principle of freedom of navigation was proclaimed in the Montreux Convention as a principle of international law independent of the will of the parties. If this principle is correctly utilized it can be of the greatest importance for the future development in this sphere.¹³⁰

Brüel's reference to the Sound Treaty was with respect to the regime of the Danish Belts and the Sound, the only water connection between the North and Baltic Seas before the construction of the Kiel (Nord Ostsee) Canal. For centuries the Danish Kings had collected dues on traffic proceeding through these restricted water areas (the Sound's minimum width is two miles, and the minimum width of the Great and Little Belts is less), and in the "secret" articles embodied in the Armed Neutrality of 1800, Denmark, Norway and Russia claimed to maintain the Baltic Sea "perpetually as a closed sea." These states recognized, however, that in time of peace all nations could navigate through it and "enjoy the advantages of perfect tranquillity," but asserted that they had the right to take all necessary measures to guarantee it and its coasts against all hostilities. Britain, France and Holland refused to accept this position, and the right to close the Baltic Sea was definitely rejected by a general treaty on this subject, the Convention of Copenhagen of March 14, 1857. By the terms of this Convention, Denmark bound itself "not to subject any ships, on any pretext, to any detention or hindrance in the passage of the Sound or the Belts." Article 195 of the Treaty of Versailles also provided for "free passage into the Baltic to all nations," and also prohibited the erection by Germany of any fortifications or installation of any artillery commanding the maritime routes between the North and Baltic Seas.¹³¹

The United States entered into a separate treaty with Denmark with respect to the Danish Straits in 1857, and paid the Danish Government a lump sum of \$400,000 in consideration of perpetual waiver of the Sound dues. Prior to that time the United States Government had expressed criticism of the regime of the Straits, and on October 14, 1848, Secretary of State Buchanan informed the U. S. Minister to Denmark that:

Under the public law of nations, it cannot be pretended that Denmark has any right to levy duties on vessels passing through the Sound from the North Sea to the Baltic. Under that law, the navigation of the two seas connected by this strait is free to all nations and therefore the navigation of the channel by which they are connected ought to be free. In the language employed by Mr. Wheaton, "even if such strait be bounded on both sides by the territory of the same sovereign, and is at the same time so narrow as to be commanded by cannon shot from both shores, the exclusive territorial jurisdiction of that sovereign over such strait is controlled by the right of other nations to communicate with the seas thus connected."¹³²

¹³⁰ Brüel, *op. cit.* 424-425.

¹³¹ Higgins and Colombos, *op. cit.* 127-128.

¹³² 1 Moore's Digest 660; citation to Wheaton's International Law (Dana's ed.).

To conclude, the fact cannot be overlooked that the Gulf of Aqaba has a multinational character, and would have such character even if Israel had no coastline on the Gulf. In spite of a current trend towards Arab unity, the three Arab coastal states are at present independent, sovereign entities. They do not appear to have entered into any sort of formal agreement to designate the Gulf a closed Arab water area, and, in fact, each coastal state has its own coastal sea legislation.¹³³ By the weight of international precedent the Gulf would seem clearly to be non-territorial and basically a part of the high seas, even though a considerable portion of the waters therein constitute the territorial seas of the coastal states. Not only is more than one coastal state involved, but also there is a belt of water along the center of the Gulf which is not included in the territorial sea of any of the coastal states (and, as we have noted, contiguous zones constitute a part of the high seas). Consequently, the straits at the entrance would appear clearly to constitute an international waterway, even though these waters comprise in their entirety the territorial seas either of Egypt or Saudi Arabia, and Article 16(4) of the Convention on the Territorial Sea and the Contiguous Zone would seem to be applicable:

//There shall be no suspension of the innocent passage of foreign ships through straits which are used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign State.¹³⁴

While the weight of the evidence points to this as being the general legal status of the Gulf, it does not necessarily follow that the right of innocent passage would be available to Israel in the absence of special arrangements through the United Nations. A number of the principal maritime states appear to be of the opinion that all states, including Israel, clearly may exercise this right, since no belligerent rights persist between Egypt and Israel. The Arab states, particularly the coastal states, and India, disagree. A definitive solution of this question would seem to depend in large part upon what interpretation is placed upon the Armistice Agreements re the problem of belligerent rights, and, as we have seen, authorities differ on this issue. While the Secretary General of the United Nations has stated on several occasions that "The international significance of the Gulf of Aqaba may be considered to justify the right of innocent passage through the Straits of Tiran and the Gulf in accordance with recognized rules of international law,"¹³⁵ he has expressed the opinion that: "A legal controversy exists as to the extent of the right of innocent passage through these waters."¹³⁶

It is submitted that it would be well for this controversy to be settled by an appropriate juridical authority, perhaps by a decision or advisory opinion of the International Court of Justice. While the United Nations Emergency Force is at present controlling the entrance to the Gulf, and the

¹³³ Notes 23, 24 and 25, above.

¹³⁴ A/CONF. 13/L. 52 (April 28, 1958), p. 6; below, p. 838.

¹³⁵ U.N. Docs. A/3500 (Jan. 15, 1957), par. 14, and A/3512 (Jan. 24, 1957), par. 24.

¹³⁶ U.N. Doc. A/3512 (Jan. 24, 1957), par. 24.

coastal states have exercised commendable self-restraint with respect to this issue, a legal solution would seem desirable, and perhaps would help to contribute to the stability of a troubled area.

For a final and complete determination of the status of the Gulf it may be necessary to await a final settlement of the Palestine question, for it is unclear at present what is the status of Israel's coastline on the Gulf. Israel's frontiers have been established by the several armistice agreements with neighboring Arab states. These agreements by their terms provide that the frontiers are not territorial boundaries, but merely temporary lines of military control, and are not intended to prejudice rights, claims and positions of the parties as regards an ultimate settlement of the Palestine question.¹³⁷ Is Israel's coastline on the Gulf, depending as it does upon the land frontiers established by the Armistice Agreements with Egypt and Jordan, of a different legal nature than that of the land frontiers? While this would seem to be unlikely, it is a question which ought to be considered by the appropriate juridical authority.

With respect to the closed-sea claim of Saudi Arabia, should a final settlement of the Palestine question deny Israel its present coastline on the Gulf, there would seem to be no objection to the littoral Arab states, by common agreement, designating the Gulf as a closed sea, at least according to the views of several eminent authorities.¹³⁸ Also, should Israel retain its coastline, there is the possibility that the four littoral states could, by unanimous agreement, achieve the same result, since Israel would be deemed another successor state of the Ottoman Empire through the Palestine Mandate, and thus the historical, as well as the geographical and other factors, found persuasive with respect to the Gulf of Fonseca, would be applied to the Gulf of Aqaba. The preparation of the study of the "Regime of Historic Waters," which the United Nations Conference on the Law of the Sea has asked the General Assembly to arrange for, may provide an opportunity for the consideration of this question.¹³⁹

Should it be possible for the coastal states to agree that the Gulf of Aqaba is a closed sea, there is the possibility that Articles 4 and 5 of the Convention on the Territorial Sea and Contiguous Zone¹⁴⁰ would be interpreted to permit innocent passage through these waters, as provided in Articles

¹³⁷ Secretary General Hammarskjöld has noted this fact in his report to the General Assembly, U.N. Doc. A/3512, Jan. 24, 1957, as have Mr. Pearson of Canada and Mr. Shukairy of Saudi Arabia at the 11th Session of the General Assembly, note 76 above.

¹³⁸ Notes 112 and 113 above. This view would seem also to be implicit in the remark of the Special Correspondent of the London Times, March 8, 1957, note 121 above.

¹³⁹ Note 105 above; p. 867 below.

¹⁴⁰ Art. 4(1) provides that: "In localities where the coast line is deeply indented and cut in, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured."

Art. 5(2) provides that: "Where the establishment of a straight baseline in accordance with Article 4 has the effect of enclosing as internal waters areas which previously had been considered as part of the territorial sea or the high seas, a right of innocent passage, as provided in Articles 14 to 23, shall exist in those waters."

14 to 23 of the same convention.¹⁴¹ This would be particularly necessary because of the positions of Jordan and Israel at the head of the Gulf. However, if a special regime for the Gulf should come into existence, the governing agreement probably would make adequate provision for passage of international shipping.¹⁴²

Pending the possible future establishment of a special regime for the Gulf of Aqaba, it would be well if agreement could be reached by the coastal states regarding their respective zones of territorial sea and contiguous zones, where there is the possibility of overlapping jurisdictions, in accordance with Articles 12 and 24 of the Convention on the Territorial Sea and the Contiguous Zone.¹⁴³

It is to be hoped that the United Nations will continue to take all steps possible towards the achievement of a political climate in the area which will make feasible a definitive determination of the legal status of the Gulf of Aqaba, so that the shipping of the international community may be free to use this increasingly important water area, whatever its status may be found to be, without controversy.

¹⁴¹ Note 99 above; see pp. 837-840 below.

¹⁴² In this connection, see Smith, *op. cit.* 23-24.

¹⁴³ A/CONF. 13/L. 52 (April 28, 1958), pp. 5 and 9.

TREATIES AND OTHER SOURCES OF ORDER
IN INTERNATIONAL RELATIONS:
THE SOVIET VIEW *

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Speaking before the American Society of International Law, Aleksandr Troianovski, the first Soviet Ambassador to the United States, summed up his views on the basic sources of order in international relations.¹ He began by rejecting the idea of a "supernational support" for international law, since the source of the rules regulating the relations among nations "lies in the nations, and not in a superforce acting from above the nations." Thus the tribunal at The Hague, he argued, is in practice nothing more than "a court of arbitration." Practical experience with the League of Nations, he felt, "goes far to prove that at the present time at least supernational bodies are not effective in binding the nations to coöperate under established rules of international law," especially since "some nations have assumed the rôle of supernations with the idea, not of coöperating with other nations, but of dominating and conquering them." "Moral laws and the laws of human conscience," he continued, could hardly be taken seriously as bases of international order, since "the guidance from this source is too subtle" and lacking in precision. It was necessary to find "something more positive, more concrete and definitive." The solution, he urged, was to be found in treaties—"very precise international treaties duly signed," based on "exact formulas and determined obligations."

Mr. Troianovski emphasized that he was presenting his personal opinions, speaking "not as the Ambassador of the U.S.S.R., but as an individual who has some interest in international law and to some extent is familiar with its problems." His views, nevertheless, reflected fairly closely those of the Soviet Government. The unequivocal Soviet preference for treaties

* This study was written in connection with the Soviet Treaty Project being conducted at the Hoover Institution on War, Revolution and Peace, Stanford University, under the direction of the authors. The findings of the project are to be published in three volumes, tentatively entitled *Calendar of Soviet Treaties*, *Analysis of Soviet Treaties*, and *Bibliography on Soviet Foreign Policy* (all 1917-1957), by the Stanford University Press in the Hoover Institution Documentary Series in 1959-1960.

¹ Address delivered on April 28, 1934, 1934 Proceedings, American Society of International Law 195-196.

as the *prima facie* source of international order has been one of the few precepts in this field which have remained fundamentally unchanged throughout the existence of the Soviet state.

There has, however, been a substantial alteration in the *context* within which this view has been held by Soviet officials and scholars. At times treaties have been viewed as the sole source of international order; at others they have been supplemented by a wide range of additional factors, including international custom, judicial decisions, general principles of international law, the codification of international law, decisions of international organizations, and "basic concepts" of international law.

These changes have been related, more or less directly, to the requirements of Soviet foreign policy and to its treaty practice, as well as to the need to elaborate a Soviet doctrine of international law capable of challenging the doctrine of the non-Soviet world. To understand the present Soviet position on this question it will be useful to review briefly the evolution of Soviet doctrine as represented by its most prominent spokesmen.²

I

1. One of the first scholars in Soviet Russia to consider the problem of the sources of international law was N. N. Golubev. In no sense a Marxist, and completely untouched in his thinking by any Marxist categories, Golubev represents the continuation under new conditions of the prerevolutionary tradition of Russian international law. His essay, "New Tasks of the Contemporary Science of International Law,"³ is a reply to a short but powerful article by S. A. Kotliarevski, another non-Marxist scholar, who argued that public international law was undergoing a profound crisis.⁴

Having pondered the questions, "What is the actual state and juridical nature of international law? What is the explanation of the crisis which it is undergoing? How can new life be breathed into it?"⁵ Golubev

² For earlier treatment of the subject in the West, see Josef Kunz, "Sowjet-Russland und das Völkerrecht," 13 *Zeitschrift für Völkerrecht* 580 (1926); B. Mirkine-Guetzévitch, "La doctrine soviétique du droit international public," 33 *Revue générale de droit international public* 69 (1926); *idem*, "Les Traités internationaux de la Russie soviétique," *Revue de droit international*, 1928, p. 1012; A. N. Makarov, "Die Völkerrechtswissenschaft in Sowjet Russland," 6 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 479 (1936); T. A. Taracouzio, "The Effect of Applied Communism on the Principles of International Law," 1934 *Proceedings, American Society of International Law* 105; *idem*, *The Soviet Union and International Law* 13 (New York, 1935); Philip M. Brown, "The Russian Soviet Union and the Law of Nations," 28 *A.J.I.L.* 733 (1934); John N. Hazard, "The Soviet Concept of International Law," 1939 *Proceedings, American Society of International Law* 33; Ivo Lapenna, *Conceptions soviétiques du droit international public* 160 (Paris, 1954); Boris Meissner, "Die Sowjetische Bewertung der Völkerrechts-Quellen," 1 *Osteuropa Recht* 2 (1955); *idem*, *Die Sowjetunion, die Baltischen Staaten und das Völkerrecht* 165 (Cologne, 1956).

³ N. N. Golubev, "Novye zadachi sovremennoi nauki mezhdunarodnogo prava," *Pravo i zhizn'*, No. 3 (1922), pp. 36-44.

⁴ S. A. Kotliarevski, "Krizis mezhdunarodnogo prava" (The Crisis of International Law), *Pravo i zhizn'*, No. 1 (1922), pp. 80-82.

⁵ Golubev, *loc. cit.* 36.

distinguished three strata of norms currently operating as sources of order in relations among nations: (a) "unilateral expression of the will of states," which, "when given generalized form through jurisprudence and, provided they possess uniformity and homogeneity, can in essence comprise a complex of identical pseudo-international law"; however, this would be only a kind of "surrogate of international law, capable of satisfying perhaps only the advocates of the view of international law as external state law"; (b) bilateral treaties: "When a network of such treaties exists, embracing a specific group of states, it can at least form a stable basis for these states in conducting their mutual local, temporal and casual relations"; (c) collective treaties, "among three or, in general, an indefinite number of states, calculated for an extended period . . . and resting on more solid legal foundations than do separate treaties."

The third stratum, Golubev thought, contained one of the ideas "capable of leading international law permanently out of its crisis," since it rested on a more solid foundation than bilateral treaties and was "something more" than the mere sum of the will of the partners. It might become the first step towards organization of the treaty partners, possibly even the beginning of a world state, "now conceivable only in hazy and indefinite contours." But then international law would become federal law, and former bilateral, or even multilateral treaties of a contractual nature, would become simple contracts.⁶ Even under such a world federation, however, Golubev foresaw no possibility of eliminating war and strife.

Notwithstanding the complete absence of Marxist conceptions in his views, Golubev came close to Soviet doctrine in his recognition of treaties as a major source of order in international relations. From the first months of its existence the young Soviet state made use of treaties to secure its position and to provide a basis for the extension of its influence abroad. But whereas, for Golubev, treaties were only a step towards an eventual world federation in which national sovereignties would become obsolete, in Soviet practice—and theory—they came to have an absolute value precisely as a safeguard against any encroachment on the sovereignty of the new state in its unavoidable contacts with other governments.

2. Golubev's tempered optimism with regard to the future prospects of international law thus bore little relation to Soviet realities. His versatile and adaptable contemporary, Yevgeni A. Korovin, was able to develop theories which were much more closely related to the actual practices of the Soviet Government at the time. It fell to Korovin to devise the first over-all attempt at a specifically Soviet theory of international law, in the framework of his concept of the "transition period," *i.e.*, the period during which capitalism and Communism exist side by side.⁷

⁶ Cf. Triepel, *Völkerrecht und Landesrecht* (1899), and Bergbohm, *Staatsverträge und Gesetze als Quellen des Völkerrechts* 77 ff., for the famous controversy of the early part of the twentieth century concerning the distinction between "treaty-contracts" (*Verträge, traités-contrats*) and "law-making treaties" (*Vereinbarungen, traités-lois*).

⁷ Ye. A. Korovin, *Mezhdunarodnoe pravo perekhodnogo vremeni* (International Law of the Transitional Period) (Moscow, 1924).

Following Triepel's arrangement, Korovin divided the sources of international order into two groups: (a) a broad one, equivalent to the law-making norm, and (b) a narrow one, reflecting a form of cognition of the legal norm.

(a) In regard to the broad concept, declared Korovin, traditional international law has developed three theories: the natural law theory, the historical theory, and the theory of the idealistic school. Not one of these theories, he argued, is suitable for the "transition period."

The theory of natural law merits rejection not only for reasons associated with its origin but chiefly because from the Marxist standpoint it is inconceivable to speak of the existence of any ideal law common to all mankind which stands above classes. If it is quite legitimate to contrast law which exists with law which one would like to see exist (since from this antithesis a revolution in law emerges which smashes the petrified forms of the old law for the sake of establishing new and more equitable forms), one ought not to forget nevertheless that the very content of the concept "socially just" is not given to mankind in ready-made form, equally binding upon all, but is developed through prolonged struggle as a result of class or group (national for instance—given the absence of sufficient class differentiation) collective self-consciousness.

For similar reasons we must equally reject the arguments of the *idealistic school*. Neither the moral nature of man as an individual (an ethical variant) nor his intuitive-legal experiences (the psychological variant) can be considered a source of any law whatsoever and much less a source of international law; international law is the product of later stages of social development and an expression of a complex historical process in human society, organized on a collective basis.

For this reason, from the point of view of international law of the transition period, the *historical school* is the most instrumental where the problem of the sources of law is adequately formed; it reasons not with reference to a "national spirit" of types and nations but uses materials of collective (mass) psychology.⁸

(b) With respect to the narrow concept of the term "source," Korovin stated, a substantial difference exists between traditional or "bourgeois" international law and the international law of the "transition period." In traditional international law, custom enjoys primacy over treaties as a source of international law and "the role of the treaty is often confined to the registration of a customary practice which has come into being (see for example the law of diplomacy or the law of war)," while in the transition period, the "treaty dominates unchallenged and custom is reduced to an auxiliary (subsidiary) source."⁹

As to the actual treaty relations between the Soviet Union and the rest of the world, the "transition period" was marked, according to Korovin, "by the unbroken sway of the treaty. . . ."

⁸ *Ibid.* 25-26.

⁹ *Ibid.* For a slight change in emphasis, see Korovin, *Sovremennoe mezhdunarodnoe publichnoe pravo* (Contemporary International Public Law) 8-9 (Moscow-Leningrad, 1926). In the latter Korovin added that "decisions of the highest organs of the League of Nations constitute a source of international law for member states."

As the soil of intercourse and unity which alone can nurture international custom is extended in the relations between states with the dictatorship of capital and states with the dictatorship of the proletariat, the repudiation of treaty compromise is equal to a renewal of the struggle of "all against all" in its military, semi-military, and "peaceful" forms of international coercion.

The conclusion is that the presumption of *custom* is typical for contemporary bourgeois international law and the presumption of *treaty* is equally characteristic for the law of the transition period.¹⁰

The practical experience of the first years of existence of the Soviet state accentuated the desperate need for treaties over all other means, methods, and bases in the conduct of Soviet foreign relations. This bitter experience shaped the Soviet view that international treaties constituted the only neutral bridge between Communist Russia and the rest of the world, the only "common tongue," the only "vehicle of compromise," the only balancer and protector of Soviet interests, the only safeguard of its sovereign rights. This experience tended strongly to displace the traditional equilibrium between treaties and international custom. Korovin, a good Communist since the October Revolution, made a valiant attempt to put Soviet scholarship on a common basis with the practical needs of the People's Commissariat of Foreign Affairs. After all, he argued, rules of international customary law, established, shaped, formulated and accepted before the Soviet Union appeared on the world scene, were formed by historical forces bound to be "ideologically hostile" to the new state. They lacked the principle of explicit consent in the conduct of international business without which the Soviet state might again become a subject of foreign intervention. In the atmosphere of little or no mutual confidence, the Soviet Union could not afford to leave its protective shell for long: international treaties were the most suitable vehicle for such limited foreign relations. Korovin was ready and willing to subscribe to this practical necessity, even if facts had to suffer in the process:

Watching each other closely, the two participants, the U.S.S.R. and the "capitalist states," met on the strictly limited ground of mutual agreement of a conventional character, only to return at once each to his own law and to his own principles. The sacred formula so dear to every adherent of international law, namely that of the "common principles of international law," has *only rarely* [!] been made in the Soviet treaties, most frequently in those with Germany, and *has been of inconsiderable practical importance*. [!] ¹¹

¹⁰ Mezhdunarodnoe pravo perekhodnogo vremeni, *op. cit.* 26.

¹¹ Korovin, "Soviet Treaties and International Law," 22 A.J.I.L. 753 (1928), italics added. While the first part of Korovin's statement was true, the second part was not: we have found 29 references to principles or common practice of international law in 20 Soviet treaties concluded with partners *other than Germany* between 1920 and 1927. See the treaties with Estonia of Feb. 2, 1920, Art. 7, par. 4b; Georgia, May 7, 1920, Art. 5, par. 8; Latvia, Aug. 11, 1920, Art. 4, par. 4; Persia, Feb. 26, 1921, Art. 22; Afghanistan, Feb. 28, 1921, Art. 3; Latvia-Ukraine, Aug. 3, 1921, Preamble and Art. 2, par. 4; Norway, Sept. 2, 1921, Art. 2, par. 2 and Art. 4, par. 2; Estonia-Ukraine, Nov. 25, 1921, Preamble, Art. 3, par. 4 and Art. 14; Austria, Dec. 7, 1921, Art. 6, par. 1, Art. 8, par. 1, and Art. 12; Italy, Dec. 26, 1921, Art. 4; Turkey-Ukraine, Jan. 2, 1922,

Korovin had in mind bilateral rather than multilateral treaties; in view of the position of Soviet Russia in a world of non-Communist states, he could not but repudiate "all attempts at world-wide collective treaties" in which the U.S.S.R. would represent a minority of one:

The unrestrained growth, quantitative and qualitative, of separate treaties of the R.S.F.S.R. and the U.S.S.R. with individual bourgeois states on the one hand and *the futility of Genoa and the collapse of the Hague attempts at universal collective treaties* on the other graphically attest to the fact that the hour has not yet struck when the international of capital as a whole will recognize the possibility of finding common tongue in agreeing and compromising with the world of emancipated labor.¹²

3. In a critique of Korovin's position published in 1925,¹³ Andrei Sabanin pointed out that, while at first glance Korovin appeared to be correct in his claim that in the "transition period, international treaties far prevail over custom as a source of international law,"

if one thinks about the problem more deeply, this assertion contains a clear misunderstanding. Treaty prevails over custom as a source, to take the area of embassy law alone, only in the first, most elementary phase of the transitional period when relations do not exist between two states. . . . Was not the author [Korovin] led to his conclusion by the circumstance that of the seventeen Soviet treaties concerning the establishment of diplomatic relations, seven are so-called *de facto* treaties which cannot fail to contain provisions on rights and privileges of mutual official representatives who are not diplomatic agents *stricto jure*? After all, the rights of these agents are neglected by custom. For comparison, let us cite the treaties with Germany of May 6, 1921, and of April 16, 1922; we would search in vain in the second treaty (*de jure*) for those articles on the mutual position of representatives, which appear abundantly in the first (*de facto*).

Sabanin's sharpness of analytical insight, absent in Korovin's exposition, also suggested the changing needs of the Soviet Government. Not that international treaties became a secondary source of order in international relations in the process—they remained the primary source. But Sabanin attempted to relate international custom to a more realistic position on the scale.

4. It was the task of Pashukanis, ten years later, to attempt a solution of the matter once and for all. Those scholars (namely, Korovin) who alleged that "the Soviet Government should recognize only treaties [as a

Art. 11; Finland, June 1, 1922, Art. 6; Czechoslovakia, June 5, 1922, Arts. 2 and 16; Czechoslovakia-Ukraine, June 6, 1922, Arts. 2 and 16; Denmark, April 23, 1923, Art. 1, par. 4 and Art. 3, par. 4; Italy, Feb. 7, 1924, Art. 1; Sweden, March 15, 1924, Art. 3; Norway, Dec. 15, 1925, Art. 1; Turkey, March 11, 1927, Art. 13; and Sweden, Oct. 8, 1927, Art. 6.

¹² Korovin, *Mezhdunarodnye dogovory i akty novogo vremeni* (International Treaties and Acts of the Modern Period) 225 (Moscow-Leningrad, 1925); *idem*, *Mezhdunarodnoe pravo perekhodnogo vremeni*, *op. cit.* 27. Italics added.

¹³ Andrei Sabanin, "Pervyi sovetskii kurs mezhdunarodnogo prava" (The First Soviet Course in International law), *Mezhdunarodnaia zhizn'*, No. 2 (1925), pp. 119-120.

source of] international law and should reject custom are absolutely wrong," wrote Pashukanis.

An attempt to impose upon the Soviet Government a doctrine it has nowhere expressed is dictated by the patent desire to deprive the Soviet Government of those rights which require no treaty formulation and derive from the fact that normal diplomatic relations exist.¹⁴

According to Pashukanis, such scholarship was not only inconvenient, it was downright dangerous for Soviet diplomatic practice.

But Pashukanis went further: International treaties and international custom were both sources of international order, but only "in the narrowly juridical sense." In a broader sense and with proper caution, even general principles of (international) law, which Korovin had so cavalierly disposed of, should not be rejected outright:

Given the extraordinary instability and indefiniteness of the volume of universally recognized customs, the references to the generally recognized principles of international law which are occasionally encountered in our own Soviet notes and treaties (see for example Article 8 of the Russo-German Agreement of 1921) should be interpreted with caution. In particular, what is involved in Soviet diplomatic documents is not the rather indefinite totality of so-called "general principles of international law" taken as a whole, but the sum of customs which has come into being in the sphere of specific relations.¹⁵

Pashukanis did, however, reject other sources of order in relations among nations, such as constitutional provisions recognizing and accepting norms of international law as the law of the land, international morality, international comity, et cetera. With respect to constitutional stipulations proclaiming that the generally recognized norms of international law are the law of the land ("as for example, in the Austrian and the German Weimar constitutions"), Pashukanis maintained that such provisions "add nothing in essence, since the question remains, what is to be considered 'generally recognized' and in what form this recognition is to be manifested." Neither was he patient with the Austinian claim that only international morality and international comity are sources of international law:

The insolvency of such a standpoint is perfectly apparent in actual practice. Every state distinguishes perfectly well between its own legal obligations binding it by virtue of a treaty or custom and the requirements of international morality or the requirements of what is conventionally called international comity.¹⁶

¹⁴ Ye. Pashukanis, *Ocherki po mezhdunarodnomu pravu* (Essays on International Law), Ch. 2 (Moscow, 1935).

¹⁵ *Ibid.*

¹⁶ *Ibid.* Pashukanis again divided international conventions into "(a) general treaties in which general principles are established and the parties to which are all or a majority of states (for example the Geneva Convention on Aid to the Wounded in War of 1864; the General Documents of The Hague Conferences on the Law of War of 1899-1907, etc.) and (b) treaty-contracts which establish obligations between or among parties and which do not constitute general rules." "This distinction," he wrote, "is quite conventional and it is difficult to draw a dividing line between the two types of treaties."

Pashukanis, however, no longer deprecated multilateral treaties; times had changed and he was no less a conscious apostle of practical politics than was Korovin. The hour had struck; the Soviet Union was now a Member of the League of Nations, the former "alliance of world bandits against the proletariat. . . ." Times had changed indeed. By 1935, when Pashukanis published his *Essays*, Golubev was already forgotten. Sabanin had become unreliable because he "propagated surreptitiously . . . reactionary anti-Marxist 'theories' which attempted to deny the qualitative distinction of the Soviet Union's international relations from the relations of the capitalist powers among themselves."¹⁷ And Korovin, through his "transition period" concept, was charged with having confused

petty bourgeois radical attempts at the "socialist" reform of international law in conditions of the capitalist encirclement, i.e., in essence followed the social-democratic theory of international law under capitalism.

The foreign world was becoming acquainted with our science of international law only through those mistaken works which were written in their time by Professor Korovin. These works, as the only ones we had, were being treated abroad as the official Soviet doctrine of international law and led to completely incorrect conclusions about our attitude towards some institutions of international law and caused no small harm to the interests of the Soviet state.¹⁸

Now that Pashukanis had reached the official zenith, his recipe for order in international relations, which consisted of a search for and consolidation of political and economic relations among states through treaties *as well as* international custom, was again altered to suit contemporary Soviet practical needs. Treaties and custom were accepted as foundations of international relations "between the two systems [only] *until the socialist system should establish its superiority beyond the borders of the U.S.S.R.*"¹⁹ After that, they would become obsolete and useless. Furthermore, Pashukanis limited all treaties to "those . . . in which we have taken part or to which we have adhered later," and advised that international custom be recognized

only within those limitations in which it does not contradict the dictatorship of the proletariat and the principles of our foreign policy.²⁰

Pashukanis' militantly Communist views failed to save him in the Great Purge. In 1937 he was denounced as an "enemy of the people" by Andrei Vyshinski for an attempt "to undermine the foundations" of the Soviet state.²¹

¹⁷ L. Ratner, "Mezhdunarodnoe pravo v marksistskom osveshchenii" (International Law in the Marxist Interpretation), *Sovetskoe gosudarstvo i pravo*, No. 6 (1935), pp. 129-130.

¹⁸ *Ibid.*

¹⁹ Pashukanis, *op. cit.* Italics added.

²⁰ *Ibid.*

²¹ See *Pravda*, Jan. 20 and April 27, 1937; T. Ingulov in *Bol'shevik*, No. 1 (1937); and especially M. Rapoport, "Protiv vrazhdebnykh teorii mezhdunarodnogo prava" (Against Hostile Theories of International Law), *Sovetskoe gosudarstvo*, Nos. 1-2 (1937), pp. 92-98. Pashukanis was posthumously exonerated in September, 1956, and

5. The purge of Pashukanis and his views left the Soviet theory of international law in a state of some confusion. Since it was difficult to specify in just what ways his theories had been defective, it was equally difficult to develop new and completely different theories which would be acceptable to the Communist Party.

As a guide for development, the journal *Sovetskoe gosudarstvo* published in 1938 the anonymous but authoritative "Theses on International Law" which may be taken to represent the views, if not necessarily the exact words, of the journal's editor, Andrei Vyshinski. With regard to the question of sources, the "Theses" are disappointingly vague. "International law," it is stated,

consolidates, in the form of mutual rights and obligations which are recorded in international treaties and agreements, domestic legislation and customs, the relations which develop between governments in the process of their political and economic struggle and collaboration in the international arena.

The "Theses" recognize the existence of a number of principles in international law which, although uncoded, nevertheless are generally accepted (*e.g.*, matters of diplomatic and consular privileges, questions of international maritime law, et cetera), together with other principles not universally accepted and some concerning which there is definite disagreement.

The Soviet Union, the "Theses" continue, employs those institutions of "bourgeois" international law which it finds acceptable (*e.g.*, consular and diplomatic law, treaty law, et cetera), but with a "deepening of their democratic aspects." "Full and genuine democracy in international relations," however, "will be possible only after the collapse of capitalism."

The reluctance of the "Theses" to attack such theoretical problems as that of sources is understandable in view of the charge that it was particularly in regard to theory that the "enemy of the people," Pashukanis, developed his "counter-revolutionary Trotskyite-Bukharinite conceptions."²² Neither Pashukanis, with his view of Soviet international law as a compromise with non-Soviet law, nor Korovin, whom the "Theses" attack as a deviser of "ultra-leftist" theories masked in Marxist phraseology, grasped the basic principle on which, according to the "Theses," a Soviet theory of international law must be constructed—the principle of close adherence to the "Leninist-Stalinist theory of foreign policy." Thus the most urgent task of Soviet international law, according to the "Theses," was to transform itself into a completely pliant and reliable tool of the Soviet Government's foreign policy.

It was to prove extremely difficult, nevertheless, for Soviet international lawyers to devise any fundamental change in the theories developed by

Vyshinski who had led the attack on him, became the target of criticism instead. See John N. Hazard, "Pashukanis is No Traitor," 51 A.J.I.L. 385-388 (1957).

²² "Tezisy po mezhdunarodnomu pravu," *Sovetskoe gosudarstvo*, No. 5 (1938), p. 119.

²³ *Ibid.*

Korovin, Pashukanis and their earlier associates. After much searching, as we shall see, they have returned to a modified form of Pashukanis' view that treaties and custom constitute the primary sources of international law. And Pashukanis has even been accorded the honor of posthumous rehabilitation, while his successful rival, Vyshinski, is now in some disrepute.

6. In an article specifically stated to be "in the form of discussion," as the draft of a chapter for a planned textbook on international law, Professor F. Kozhevnikov in 1940 once more took up in systematic fashion the question of sources.²⁴ His treatment of the problem presented few innovations, despite his obvious effort to toe the Party line. Agreeing with earlier Soviet writers that "treaties and agreements between states" are a major source, he nevertheless warned against underestimating international custom, notwithstanding its "uncertainty, instability and relativity." It should be noted, he wrote,

that many institutions in the realm of international law are based on custom. Thus, for example, almost the entire ambassadorial law is common law.

To round out his treatment of the subject, Kozhevnikov indicated cautious approval of such other traditionally accepted subsidiary sources as domestic legal and judicial precedents and national legislation (using as an example the Soviet foreign trade monopoly, which has become "a standard of international law"). Judicial decisions, particularly of international legal agencies, Kozhevnikov maintained, serve to ascertain and interpret the existing sources of international law and are sometimes cited as precedents, but they do not create the standards of law.

In an article for the *Large Soviet Encyclopedia*, published in the same year,²⁵ Kozhevnikov gave a more succinct treatment of the subject. "The basic external sources of positive international law," he stated,

. . . are, mainly, treaties and agreements between governments and international customs. . . . The actual political relations between governments are transformed into international law [relations] from the moment when they conclude international agreements, or from the moment of their adherence to an already existing treaty, or from the moment of their official announcement concerning some rights or obligations, or on the basis of international custom.

The remainder of the article is devoted mainly to an effort to support in detail the foreign policy of the Soviet Union at the moment of writing, an effort which makes the article something of an historical curiosity, since, among other things, Kozhevnikov singled out for praise the Soviet Union's non-aggression pacts with the Baltic states, which were to be violated only a few months after the article had appeared in print.

On the whole Kozhevnikov was more successful when he stuck to theory. His formulation of the question of sources remained the standard for a

²⁴ F. I. Kozhevnikov, "K voprosu o poniatii mezhdunarodnogo prava" (On the Question of the Concept of International Law), *Sovetskoe gosudarstvo i pravo*, No. 2 (1940), p. 101.

²⁵ F. I. Kozhevnikov, "Pravo mezhdunarodnoe," 46 *Bol'shaia sovetskaia entsiklopediia*, cols. 635-643 (Moscow, 1940).

number of years, and when he returned to the subject in 1947 there was little which required change.²⁶

7. Writing in 1947, the Soviet legal scholar and Judge of the International Court of Justice, S. B. Krylov, followed the familiar line: Just as the primary source of domestic law is a statute, he stated, so the primary source of international law is an international treaty.²⁷ Krylov made a perfunctory gesture towards Marxist theory in his treatment of sources by noting at the outset that "in the so-called material sense" the struggle and collaboration between governments is the source of international law, but he left this proposition without discussion or development, and turned to the treatment of sources in the narrow sense. "International treaties," he wrote, "i.e., treaties concluded between states, are the basic source of international law."

Krylov distinguished between bilateral and multilateral (collective) treaties, noting that

(Collective treaties are concluded with particular frequency in the field of communications, transportation and maritime law in general, but also include treaties which are broader in content and which concern fundamental political issues, e.g., a treaty such as the Charter of the United Nations.²⁸

Both types he accepted as the "fundamental source of international law." He further resurrected the old distinction between treaty-contractors and law-making treaties which such earlier writers as Korovin had rejected, but without introducing any change in the analysis.

²⁶ *Idem*, *Uchebnoe posobie po mezhdunarodnomu publichnomu pravu* (Textbook on International Public Law) 32-34 (Moscow, 1947), reviewed in 43 A.J.I.L. 387 (1949). See also his "Sovetskoe gosudarstvo i mezhdunarodnye dogovory" (The Soviet State and International Treaties), in Korovin (ed.), *S.S.S.R. i problemy mezhdunarodnogo prava* (The U.S.S.R. and Problems of International Law) 81-82 (Moscow, 1947). For essentially the same point of view, though now supported by new evidence, see his article "Neotorye voprosy teorii i praktiki mezhdunarodnogo dogovora" (Some Questions of the Theory and Practice of the International Treaty), *Sovetskoe gosudarstvo i pravo* No. 2 (1954), p. 65: "The international treaty is the major legal source of contemporary international law. This statement, belonging to the number of universally recognized principles of this law, is affirmed by the United Nations Charter. Thus, in the Preamble to the Charter, it is indicated that there must be created '... conditions under which may be observed justice and respect for obligations, emanating from treaties and other sources of international law. . . .'"

"The primary significance of treaties, in the mentioned respect, is quite evident from the Preamble. The International Court of Justice of the United Nations, which is bound to resolve disputes submitted to it on the basis of international law, employs primarily international conventions, general as well as the special ones, which establish the rules, specifically recognized by the states in dispute (Art. 38 of the Charter of the International Court of Justice)."

²⁷ S. B. Krylov in V. N. Durdenevski and S. B. Krylov (eds.), *Mezhdunarodnoe pravo* 20-21 (Moscow, 1947). See also S. B. Krylov, "La doctrine soviétique du droit international," 70 *Hague Academy Recueil des Cours* 411-474 (1947, I).

²⁸ *Mezhdunarodnoe pravo*, *loc. cit.* 21. "Naturally, the great majority of treaties are bilateral for the simple reason that if each of the over 60 states concludes a single (bilateral) treaty with all the others, the result is 1770 treaties." "La doctrine soviétique," *loc. cit.* 437.

Krylov's second source was international custom. Repeating Pashukanis' view that established custom facilitates international intercourse, and illustrating the point with Sabanin's example of the law of embassy, Krylov stressed the "considerable significance" of international custom, which continues to play an important rôle, resting as it does "upon a practice which has extended over centuries" and in view of the fact that "an international code does not exist," while "the content of the numerous international treaties does not cover all the problems of law which arise in international intercourse." After all, a device such as international custom could be extremely useful; even the Soviet Ministry of Foreign Affairs was bound to establish its own custom:

In particular, specific rules for the treatment of diplomats who are accredited to us have come into being in the Ministry of Foreign Affairs of the U.S.S.R.; in other words, a Soviet diplomatic practice has been established, Soviet diplomatic custom. It goes without saying that the protocol customs of the U.S.S.R. are democratic and simple. . . .²⁹

Krylov differentiated between international custom and *practice or usage*,³⁰ which consists of "a kind of mixture of the legal source and a certain technical norm, and for this reason is not of an imperative but of a discretionary nature. Of course, it is international custom which is particularly significant for international law."³¹

Krylov found a third source of international law in the decisions of international organizations such as the League of Nations and the United Nations, and of other permanent or temporary international agencies, such as arbitration commissions or special administrative agencies, *e.g.*, the International Commission of the Danube. "This source of international law does not always receive proper attention, despite its great significance and the importance of the role which it plays," complained Krylov.³² Provided that decisions of international organizations were so recognized, accepted, and applied by the membership at large, according to Krylov, they became "an important source of international law":

At its Assemblies (general meetings) the League of Nations adopted a number of decisions. These decisions, both of the general meetings of the League of Nations and of its agencies, were a source of international law for the members of the League, *provided they were recognized and applied in practice*. If this condition is kept in mind, there is no doubt that the decisions of the Permanent Court of International Justice in The Hague, as well as its conclusions on the legal issues which were referred to it, were a source of international law. The activity

²⁹ Mezhdunarodnoe pravo, *loc. cit.* 23. Krylov cited the Soviet Consular Charter and the Code of Commercial Navigation of the U.S.S.R. as examples of the application of custom.

³⁰ A distinction which Art. 38 (1) of the International Court of Justice, through "the curious drafting . . . tends to distort." Herbert W. Briggs, *The Law of Nations: Cases, Documents and Notes* 46 (London, 2nd ed., 1953).

³¹ Mezhdunarodnoe pravo, *loc. cit.* 24.

³² *Ibid.* Decisions of "the highest organs of the League of Nations" had been introduced as far back as 1926 by Korovin as a third source of international law, though only for members of the organization. See note 9 above.

of the United Nations Organization, of its General Assembly and other agencies, primarily the Security Council, may have the result that several of the decisions of these agencies will, keeping in mind the condition stipulated above, prove to be an important source of international law.³³

Decisions of international organizations, Krylov maintained, are an important source of international law if they are *truly binding*. For example, decisions (not recommendations) of the Security Council, if based on the unanimity principle of permanent members, must be considered a distinct source of international law because the procedure of the Security Council with its right of veto is one of the "cornerstones" of the United Nations.³⁴ Decisions of the International Court of Justice are "without the slightest doubt . . . [also] sources of international law" when they are findings in legal (not political) questions submitted to the Court.³⁵

A fourth source of international law, subordinated to treaties, custom, and decisions of international organizations, according to Krylov, is the domestic legislation and court practice of individual states if recognized by other states:

For example, the law of an individual state concerning the position of foreigners, or the decision of a tribunal in a case concerning a foreigner, may be recognized in another interested state and, consequently, may come to have the significance, as it were, of an international agreement, constituting a possible source of international law. Thus, all intra-state sources of law which exist for any specific state may, generally speaking, constitute a source of international law if they concern international relations and are recognized by another state or are not challenged by that state.

Thus, for example, if the British High Court has rendered a decision in a case which concerns the Soviet foreign trade monopoly, to the extent that the U.S.S.R. recognizes this decision and draws the necessary conclusions therefrom, it is a source of international law in the mutual relations between the U.S.S.R. and England.³⁶

This is only an indirect, secondary source of international law, however, subordinate to the three "fundamental" sources; if Anglo-American legal scholars suggest that in view of this source "international law is 'part' of domestic law," Krylov warned, they are sadly mistaken.³⁷

The general principles of international law are not, in Krylov's opinion, a basically new *legal* source of law. They consist of "principles derived from international practice and international custom which are registered particularly in court decisions." At variance with Korovin's erroneous statement mentioned above, Krylov readily admitted that international treaties, and in particular Soviet treaties, contain copious references to the general principles of international law. It is difficult, however, "to give adequate

³³ *Ibid.* 24-25. Italics added.

³⁴ S. B. Krylov, "K obsuzhdeniu voprosov teorii mezhdunarodnogo prava" (Concerning the Discussion of Questions of the Theory of International Law), *Sovetskoe gosudarstvo i pravo*, No. 7 (1954), p. 78.

³⁵ *Mezhdunarodnoe pravo, loc. cit.* 24-25.

³⁶ *Ibid.* 25-26.

³⁷ *Ibid.*

consideration to this source of international law," since "to study the norms contained in international treaties, one must in all cases examine several hundred such treaties, even if one approaches such a study with a very strict selection of sources." As to the exact nature of the "general principles," Krylov was completely silent. Even more difficult, he stated, would be the task of establishing the basic principles of international custom or the decisions of international organs.

It is noteworthy that Krylov's treatment of the question of "basic principles," to which other Soviet writers give much greater emphasis, reflects his background as a scholar and judge, rather than a professional jurist primarily concerned with adapting his theories to the current demands of the Party line.

In view of the difficulty of establishing norms in this field, Krylov spoke with guarded approval of attempts at the codification of international law, stressing particularly the value of international law doctrine. His treatment of sources ended with a discussion of means of legal settlement of cases in international private law. It is clear, however, that he did not include these among the sources, since they "merely contain references to some other direct norm which is for the most part taken directly from the domain of domestic law" (collision norms).

8. An article on international law in the Soviet *Diplomatic Dictionary*, published in 1950, repeated the established theme with a few variations.³⁸ Treaties were again cited as the principal source; international custom and domestic legislation were recognized as valid but subsidiary sources, while the writings of "distinguished authors" on international law were considered merely a basis for "argumentation in favor of the existence or non-existence of this or that norm of international law."

Unlike Krylov, the author of the article gave particular emphasis to the "basic principles" of international law, considering them "binding on all governments, regardless of whether they are applied through custom or through international conventions." These principles, the existence of which "Soviet juridical doctrine not only recognizes but stresses," are identified as "the support of universal peace and security," sovereignty, non-interference in the internal affairs of other states, the equality of governments, and the conscientious fulfillment of international treaties and obligations.

9. In the development of Soviet international, as well as domestic, law no one played a more significant part than the ex-Menshevik lawyer, Andrei Vyshinski. His ready grasp of the purposes and methods of the Communist dictatorship and his willingness to put his talents at the disposal of the Party made him a most valuable Soviet spokesman, despite his spotty political past. Beginning as a prosecutor and judge in propaganda trials prepared by the Soviet secret police, he later turned his attention particularly to the field of foreign affairs and international relations. We

³⁸ "Mezhdunarodnoe pravo" in A. Ya. Vyshinski (ed.), *Diplomaticheskii slovar'*, Vol. 2, cols. 123-131 (Moscow, 1950). The article may well have been written by Korovin, who was a member of the editorial committee.

have already noted his part in the overthrow of Pashukanis and the call for a new basis for the Soviet theory of international law. Vyshinski was primarily a political figure rather than a scholar or theorist, and he was usually too concerned with the urgent tasks of the moment to formulate a theoretical conception of international law. Nevertheless his opinions must be considered here, since they illuminate particularly clearly the close relation between Soviet theory and practice, and because they served as obligatory guides to the lesser men—scholars, jurists and professors—who had the task of working out the theoretical implications of Vyshinski's specific actions and propositions.

One of the most direct statements by Vyshinski on the subject of the sources of international law occurs in an article published in 1948 on "International Law and International Organization."³⁹ The major aim of the article was to attack the developing sentiment in the West for the establishment of some form of supra-governmental authority to which individual states would yield up a portion of their sovereignty. Against this sentiment Vyshinski set up the "general principles of socialist democracy," as enunciated at various times by Stalin—sovereignty, the free choice by the citizens of a country of their form of government, and so forth, citing the Soviet leader's wartime pledges with regard to the nations of Eastern Europe. These principles, Vyshinski argued, cannot be reconciled with those of the "Anglo-American bloc," which is "aiming at world dominance." Since no basis exists under these conditions for compromise, it is "clear that international collaboration is possible only on the basis of understanding and coordination of measures in the sphere of international law." "It must be clear to everyone," Vyshinski wrote,

. . . that solid international law and order can be assured only on the basis of understanding and the recognition of the mutual needs, interests and rights of sovereign states. That is why the Soviet theory of international law regards the treaty, resting on the principles of the sovereign equality of peoples and the respect for mutual interests and rights, as the basic source of international law. This secures for international law and its institutions full moral as well as juridical force, since at their base will lie the obligations agreed to and voluntarily assumed by nations.⁴⁰

Thus the Soviet Union's most prominent and influential spokesman in the international arena once more subscribed whole-heartedly to the traditional Soviet doctrine that in the absence of an agreement by the non-Soviet world to accept the Soviet view of international relations, the only valid source for international law is the treaty.

10. In a textbook on international law prepared by the Institute of Law of the Soviet Academy of Sciences and published in 1951,⁴¹ Korovin dis-

³⁹ A. Ya. Vyshinski, "Mezhdunarodnoe pravo i mezhdunarodnaia organizatsiia," *Sovetskoe gosudarstvo i pravo*, No. 1 (1948), p. 22.

⁴⁰ *Ibid.*

⁴¹ Ye. A. Korovin, *Mezhdunarodnoe pravo* 16 (Moscow, 1951). The volume was prepared by a committee of members of the Institute of Law under the general direction of Korovin. Although approved for publication in August, 1950, it was not sent to the printer until April, 1951. See review in 46 A.J.I.L. 583 (1952).

tinguished between sources of order in the broad sense (following the Marxist conception of law as part of the ideological superstructure raised on the basis of the form of production in a given society) and in the narrow juridical sense. Of the latter, he followed earlier Soviet analysts in giving first priority to international treaties, with international custom a close second.

Defining the treaty as "an agreement between governments respecting their rights and obligations," he added the reservation that it must be the "voluntary and equal expression of wills of the corresponding states." The paramount importance of treaties he related directly to the "co-existence of states with different socio-economic structures," citing with approval Vyshinski's pronouncement that under such conditions "international collaboration is only possible on the basis of understanding and coordination of measures on the international level."⁴²

With regard to international custom, which he defined as "the norm of behavior of governments," Korovin specified that it included only those "customary norms which are not in contradiction with the socialist legal conscience and which are generally accepted, i.e., accepted as such by the Soviet Government as well." Thus there could be no danger that the Soviet Union would find itself bound by an international custom to which it had not given specific approval, while any custom which it had not so approved would not enter into its concept of the sources of international law.

The old distinction made in "bourgeois literature" between a law-making treaty and a treaty-contract, Korovin stated, is "groundless," although it was an indisputable fact that some treaties have a broader, others a narrower scope.⁴³

The "general principles of law" cited in Article 38 of the Statute of the International Court, Korovin argued, cannot by themselves be called sources of international law; they become so only through embodiment in treaties or international custom. Internal legislation can enter into international law only in a similar way, a fact which does not prevent a document such as the "Stalin Constitution" from having "great influence on the development of international law as well"—although not perhaps in the sense Korovin intended.

Judicial decisions and scholarly doctrines are not, in Korovin's view, sources of international law, but can only serve to extend, never to create, "definite legal norms in international relations." He rejected decisively the opinion of "a few foreign scholars" that international comity forms a source of international law, on the ground that there is neither obligation nor compulsion to accept it as such among nations.

Recognizing the absence of any generally accepted codification of international law, a situation he ascribed to the "continually sharpening international contradictions and the tendency of imperialist states to limit themselves as little as possible even by purely formal bourgeois legality," Korovin nevertheless gave cautious approval to the "partial" codification of

⁴² Note 39 above.

⁴³ *Mezhdunarodnoe pravo, op. cit.* 16-17.

international law, *i.e.*, a codification of those "positions" which "aid in the strengthening of the bases of democratic legality and its genuinely progressive development."⁴⁴

11. In 1950 the Institute of Law of the Soviet Academy of Sciences published a monograph by N. N. Polianski on the International Court of Justice.⁴⁵ Discussing Article 38 of the Statute of the Court, Polianski dealt in turn with each of the sources of international law listed there under the two headings, basic and auxiliary.

With regard to the basic sources listed—international conventions, international custom, and the general principles of law recognized by civilized nations—Polianski was on familiar ground with the first two. On treaties he quoted with approval Vyshinski's authoritative verdict that

the Soviet theory of international law regards the treaty, resting on the principles of the sovereign equality of peoples and the respect for mutual interests and rights, as the basic source of international law.⁴⁶

With regard to international custom, Polianski maintained that it could be accepted as a valid source of international law "only insofar as it reflected the agreement of governments" so to consider it.⁴⁷

In his treatment of the concept of general principles of law as a primary source of international law, Polianski was on less familiar territory, and with the caution appropriate to a pioneer, merely staked out a position without fully exploring its implications. Rejecting the view of "a few authors" that the "general principles" mentioned in Article 38 could only refer to the principles underlying the codes of individual nations, as well as the "dominant view" that the general principles possessed only subsidiary importance, and that, in case of a conflict with specific treaty provisions, must yield to the latter, Polianski argued that the "general principles" referred to were the fundamental bases of international law, and that in case of a conflict between the general principles so understood and specific treaty provisions, the latter would have to yield.⁴⁸ Thus Soviet international law cautiously moved towards a position in which it could cite "fundamental principles" as the basis for claiming the specific treaties of other states to be invalid.

With regard to the "auxiliary sources" mentioned in Article 38—judicial decisions and the doctrine of the most highly qualified experts in public law of the various nations—Polianski limited himself to a consideration of the actual practice of the International Court and the Permanent Court of International Justice, noting that, while earlier decisions were in fact often cited as precedents, the decisions of the Permanent Court had in no case been based on the views of scholarly authorities, although such views had been frequently advanced in the briefs presented to the Court.⁴⁹ Thus by implication Polianski accepted as a subsidiary source the judicial decisions

⁴⁴ *Ibid.* 18–19.

⁴⁵ N. N. Polianski, *Mezhdunarodnyi sud* (Moscow, 1951). The volume was edited by Korovin.

⁴⁶ Note 39 above.

⁴⁸ *Ibid.* 127–128.

⁴⁷ Polianski, *op. cit.* 123.

⁴⁹ *Ibid.* 128–130.

of international tribunals, but rejected the doctrine of experts on international law.

12. V. I. Lisovski, author of the first Soviet textbook on international law to be published after Stalin's death,⁵⁰ distinguished again between sources "in the broad sense, [by which] should be understood conditions of the material life of society, i.e., the type of productive relations characteristic for it which define its ideological superstructure," and sources in the narrow, particular meaning, by which he meant "those special, external forms which clothe the norms of the corresponding branches of law."⁵¹ In other words he paid homage, as had Korovin in 1951, to Marx and Engels, while dealing with the "narrow" sources without the influence of official theory.

Lisovski similarly emphasized treaties as the principal basic source (in the "narrow, special" sense) of international law; he repeated that they must, however, contain "a voluntary and equal expression of wills of the states which concluded them" (as differentiated from "unequal treaties" which are invalid *ipso facto*), and must not contradict the "universally recognized norms of international law," i.e., those approved by the Soviet Union.⁵²

However, after listing (2) international custom, (3) judicial precedents of international courts and courts of arbitration as well as pertinent decisions of national courts, and (4) internal laws ("when they concern or touch upon questions of international intercourse and do not contradict its principles"), Lisovski maintained that (5) decisions and decrees of international organizations, "adopted within the limits of their competence and not contradicting the basic principles of international law," are an "obligatory" source of international law "*even for those states which have not taken direct part in their adoption.*"⁵³

This new qualification of a familiar source surprised Soviet scholars as much as it did their Western colleagues. In a general session of the International Law Section of the Vyshinski Institute of Law of the Soviet Academy of Sciences, Professor Durdenevski, in a generally damning review, sharply questioned Lisovski's unconventional concept:

According to the Charter of the United Nations, decisions of the Security Council are binding on all the UN members; this does not mean, however, that decisions of all international organizations are binding on [those] governments which did not adopt these decisions.⁵⁴

Such a view, Durdenevski argued, would limit Soviet sovereignty (the "cornerstone of international law") and would endanger the Soviet inter-

⁵⁰ V. I. Lisovski, *Mezhdunarodnoe pravo* (Kiev, 1955); reviewed in 51 A.J.I.L. 135 (1957).

⁵¹ *Op. cit.* 28.

⁵² *Ibid.* For comparison, see Korovin, above.

⁵³ *Ibid.* Italics added.

⁵⁴ V. S., "Obsuzhdenie knigy V. I. Lisovskogo, *Mezhdunarodnoe pravo*" (Discussion of the book by V. I. Lisovski, *International Law*), *Sovetskoe gosudarstvo i pravo*, No. 6 (1956), p. 121.

national position. As Professor Hazard pointed out in his review of Lisovski's textbook,

One wonders whether this view would be held if the U.S.S.R. did not participate [in the given decisions of international organizations], and how it squares with the Soviet objection to the Security Council's decision to enter the Korean conflict after the Soviet "walk-out."⁵⁵

It seems probable, however, that Lisovski's position was less heretical than it at first appeared, and that far from representing an attempt to weaken the Soviet Union's international position, it was in reality an effort to strengthen that position along lines developed by earlier Soviet writers on the subject. It will be noticed that in his statement on the "decisions and decrees of international organizations," Lisovski had introduced the qualification, "not contradicting the basic principles of international law." What these principles are he did not specify. But in the light of earlier Soviet doctrine, it seems certain that they are the principles developed or adopted by Soviet experts in international law as ideological weapons for the support of Soviet foreign policy. By his failure to specify what principles he had in mind, and by his apparent implication that under certain circumstances the Soviet Union might find itself bound by decisions to which it had not been a party, Lisovski left himself open to attack and misunderstanding, but it is doubtful that he had any intention of varying from what he understood to be the current Soviet doctrine of international law.⁵⁶

13. V. M. Shurshalov, writing in 1957 on *Bases of the Validity of International Treaties*,⁵⁷ reiterated that "the international treaty is the fundamental source of international law," and went even further:

. . . *contemporary international law is basically treaty law*. It follows that the progressive development of international law depends to a significant degree on treaty practice, while international treaties . . . are at the same time a factor in its constant rejuvenation and perfection.⁵⁸

According to Shurshalov, however, a treaty may be in conflict with the "basic principles and concepts" of international law, and may therefore be invalid. These principles Shurshalov defined as follows: (1) universal peace and the security of nations; (2) respect for the sovereignty and territorial integrity of nations which are members of the international community; (3) non-interference in the internal affairs of states; (4) equality and mutual benefit as between nations; and (5) the rigorous fulfillment of obligations assumed under treaties—*pacta sunt servanda*. Any

⁵⁵ John N. Hazard, review of Lisovski's book in 51 A.J.I.L. 135 (1957).

⁵⁶ The attack by Soviet scholars on Lisovski's book followed in the pattern of the blistering criticism accorded his earlier book on the unification of the Ukraine with Russia (Kiev, 1954). See the review in *Sovetskoe gosudarstvo i pravo*, No. 5(1955), pp. 146-149.

⁵⁷ V. M. Shurshalov, *Osnovaniia deistvitel'nosti mezhdunarodnykh dogovorov* (Moscow, 1957).

⁵⁸ *Ibid.* 130-131. Italics added.

treaty which proves to be incompatible with these principles, Shurshalov maintained, is invalid.⁵⁹

As examples of such "invalid" treaties Shurshalov cited a long list of treaties of which the Soviet Government disapproved: the NATO Pact, the Treaty of Peace between Japan and the United States, the treaties of the United States with the Nationalist Government of China, the Anglo-American agreement on the establishment of air bases in Great Britain, the SEATO Pact, the Marshall Plan, the agreements under which the Federal Republic of Germany was established from the zones of occupation of the three Western Powers, and so forth and so on.⁶⁰ These examples make clear the purpose which the elaboration of the concept of "basic principles" is designed to serve. Having rejected the "basic principles" of the West, or reinterpreted them to serve its own needs, and having seen its advocacy of treaties as a primary source of international law gradually win the assent of the non-Soviet world, Soviet international law and in particular Soviet treaty law is now ready to move to the more advanced position of establishing its own "basic principles," on the strength of which it can judge and condemn the treaties of the non-Soviet world.

II

In the period following World War II, Soviet scholarship, as we have seen, began to stress—and quite consistently—a new "fundamental" source of world order of peculiarly Soviet vintage, called "basic laws, concepts and norms of international law." In 1935, Pashukanis had advised that the general principles of international law "should be interpreted with caution" because of their "rather indefinite totality."⁶¹ During the following decade, Soviet international lawyers did their best to eliminate the vagueness by preparing a list of laws, principles and concepts of international law which the Soviet Government accepted as "cornerstones" of international order. The cumulative tendency of this list was to limit further the freedom of action of states in international relations by a curious mixture of legal, political, ideological and ethical precepts and norms, all of which allegedly "possess special significance for the strengthening of legality in international relations."⁶² The list varies from time to time and from author to author, but usually includes some or all of the following concepts: the obligation of keeping and protecting the general peace and security; international co-operation among all states, and especially among the great Powers; national sovereignty and equality; non-interference in the domestic affairs of other states; non-aggression; maintenance of trade relations among nations; the right to enter into treaty relations; conscientious fulfillment of international treaties and obligations in good faith; the right to legal use of force against violators of treaties and customary international law; national self-determination; the right

⁵⁹ *Ibid.* 140–144.

⁶⁰ *Ibid.* 148–154.

⁶¹ Pashukanis, Ocherki, *loc. cit.*

⁶² *Diplomaticheskii slovar'*, *op. cit.*, col. 124.

to national respect and honor; the right to the maintenance of diplomatic relations; and international legal responsibility for cases of violation of international law.⁶³

This list of principles represents those which the Soviet Government "not only recognizes but especially stresses" in international relations. Many are taken directly from the U.N. Charter; others "have been recognized as norms of international law for a long time and have now received a new content"; still others "were only recently accepted in international law, not as political ideas but as legal norms."⁶⁴ However, irrespective of

⁶³ Krylov in Durdenevski and Krylov, *op. cit.* 16; Durdenevski, *ibid.* 113; Kozhevnikov, *Uchebnoe posobie*, *op. cit.* 24-25; *Diplomaticheskii slovar'*, cols. 124-125; D. B. Levin, *Sovremennoe mezhdunarodnoe pravo*, No. 4, p. 268 (Moscow, 1946); Shurshalov, *op. cit.* 138-158.

⁶⁴ *Diplomaticheskii slovar'*, cols. 124-125. For official sources of these "principles" and "concepts," see 1 *Mezhdunarodnoe pravo v izbrannykh dokumentakh* (International Law in Selected Documents) 5-21 (ed. by L. A. Modzhorian and V. K. Sobakin, Moscow, 1957). The following documents are printed: (1) Arts. 1 and 2 of the U. N. Charter (Purposes and Principles); (2) Declaration of the Supreme Soviet of the U.S.S.R. of Feb. 9, 1955 (on peace, equality, non-intervention, non-aggression, sovereignty, national independence, peaceful co-existence, and against a new war); (3) Joint Declaration of the Soviet Union and the Chinese People's Republic of Oct. 12, 1954 (on mutual respect for sovereignty and territorial integrity, non-aggression, non-intervention in domestic affairs, equality and mutual interest, peaceful co-existence, and for creative international co-operation); (4) Joint Statement of the Chairman of the Soviet Council of Ministers, N. A. Bulganin, and Indian Premier Nehru, of June 22, 1955 (on mutual respect for territorial integrity and sovereignty; non-aggression; non-intervention in domestic affairs whatever the motives—economic, political or ideological; equality and mutual interests; and peaceful co-existence); (5) Joint Statement of the Chairman of the Soviet Council of Ministers, N. A. Bulganin, and the Premier of the Union of Burma, U Nu, of Nov. 3, 1955 (on mutual respect for territorial integrity and sovereignty; non-aggression; non-intervention in domestic affairs; equality and mutual interests; peaceful co-existence and economic co-operation); (6) Declaration of the Governments of the U.S.S.R. and the Federative People's Republic of Yugoslavia of June 2, 1955 (on indivisibility of peace; collective security; respect for sovereignty; independence, territorial integrity and equal rights in relations with other states; recognition and development of peaceful co-existence independent of ideological differences and differences in social structure; mutual respect and non-intervention in domestic affairs whatever the causes—economic, political, ideological—since "differences in social structures and concrete forms of development of socialism are exclusively a problem of the different countries [*sic*]"; on "development of bilateral and international economic cooperation . . . to aid the U.N.; . . . against propaganda which spreads distrust among nations; . . . against domination of some countries over others; . . . and against military blocs"); (7) Agreement between the Chinese People's Republic and the Republic of India concerning trade and relations between the Tibet District of China and India of April 29, 1954 (on mutual respect for territorial integrity and sovereignty; mutual non-aggression; non-intervention in domestic affairs; equality and mutual interest; and peaceful co-existence); (8) Communiqué about discussions between Prime Minister and Foreign Minister of the Chinese People's Republic Chou En-Lai and Prime Minister and Minister of Foreign Affairs of India Nehru of June 28, 1954 (on mutual respect for territorial integrity and sovereignty; non-aggression, non-intervention in domestic affairs; equality and mutual interests; and peaceful co-existence. "The Prime Ministers expressed the hope that these principles would be accepted not only in relations among various countries but also in international relations in general as fundamental principles of peace and security, irrespective of social and political systems in different coun-

their source, the principles might appear in general to constitute a valid basis for *rapprochement* between Soviet theories of international law and those of the non-Soviet world. The difficulty, of course, is that these concepts have indeed been filled with a "new content" in their Soviet interpretation, so that each of them must be patiently redefined, not only in terms of what Soviet scholars and public figures have stated, but in the light of Soviet practice. We have already noted the function to which the concept of sovereignty is turned by Soviet specialists in international law: in effect, any effort at the establishment of a supra-national authority with which the Soviet Union is not associated, or of which it disapproves, can be condemned as an attack on national sovereignty, whereas the complete dominance by the Soviet Union of the governments of the satellite states is not even considered relevant to the principle of sovereignty by Soviet international lawyers. Similarly, one could work through the entire list, showing by specific quotations and examples the way in which these concepts have been chosen for their suitability as weapons in Soviet foreign policy for certain specific targets.⁶⁵

III

To sum up:

1. *International treaties and agreements*, ever since the first Soviet entry into foreign relations, have remained the fundamental source and *prima*

tries''); (9) Declaration on assistance to universal peace and co-operation accepted at the Conference of Asian-African Countries in Bandung on April 24, 1955 (on the interdependence of peace and international security through the U.N.; on effective international control of weapons and armaments; on the utilization of atomic energy for peaceful purposes; on the interdependence of freedom and peace; on social progress and freedom; the right to self-determination and independence as soon as possible for dependent countries; freedom to select their own political and economic system, their own way of life in accordance with objectives and principles of the U.N. Charter; on the respect for fundamental human rights and also the objectives and principles of the U.N. Charter; respect for sovereignty and territorial independence of all countries; recognition of equality of all races and all nations large and small; non-intervention in domestic affairs of other countries; respect for rights of all countries for individual and collective defense in accordance with the U.N. Charter; refraining from agreements concerning collective defense in the private interest of any big Power; refraining from exerting pressure on other countries; regulation of international disputes by peaceful means such as conciliation, arbitration, judicial decisions as well as other peaceful means which the parties may choose in accordance with the Charter of the U.N.; mutual interest and co-operation; and respect for justice and international agreements).

⁶⁵ The rationale of the Soviet use of concepts of international law was frankly stated by L. Ratner: "Our task is not the creation of some new system of international law, but simply the application, the employment and, if necessary, the advancement of those concepts of international law which objectively aid the U.S.S.R. in its struggle for peace and for the realization of its great goals concerning the building of socialism.

"We will utilize even the old concepts of international law which will serve these goals. Let us take, for example, the principle of sovereignty, which is not at all a socialistic principle, but which we nevertheless support because it helps us mobilize the strength of the oppressed peoples for a joint struggle against imperialism and is an important slogan in the national liberation struggle in the East." L. Ratner, *Mezhdunarodnoe pravo v marksistskom osveshchenii*, *op. cit.* 131-132.

facie foundation of relations between Soviet Russia and other governments. The practice of the Soviet Government abundantly confirms this fact: In the forty years of its existence, the Soviet Government has concluded over 2000 treaties, agreements and conventions (more than 1800 bilateral and nearly 300 multilateral) with some 85 partners.⁶⁶

All of the Soviet leaders, from Lenin to Khrushchev, have relied more on international treaties than on all other foundations of international order combined. Both by words and deeds they have made clear their view that treaties constitute the ideal vehicle for relations between the Soviet state and the outside world.⁶⁷ This reliance on treaties has not tended to slacken as the power of the Soviet state has increased; quite the contrary. Under Khrushchev, the Soviet state has stepped up the pace of its treaty policy. During the first two years of Khrushchev's economic and cultural offensive, the Soviet Government concluded more than 300 treaties with some forty partners, especially the leading Afro-Asian nations: 143 in 1955 (of which 135 were bilateral agreements) and 167 in 1956 (of which 142 were bilateral), the highest number of treaties ever concluded by the Soviet Government in a two-year period.⁶⁸

The absolute dependence of Soviet theory on the practice of the Soviet state is a well-known fact. Such distinguished students of Soviet law and Soviet international law as Calvez, De Visscher, Hazard, Kelsen, Kulski, Lissitzyn, and Meissner, agree that Soviet international law doctrine was elaborated according to Soviet state practice, in agreement with that practice, and to fortify and justify that practice. In our study of the forty-year period of Soviet treaty-making, we have found many changes and disagreements, much heresy and ideological tightrope-dancing in Soviet treaty theories in the several sharply delineated stages of development of the Soviet state. But we have also found that it was Soviet treaty practice which always preceded and determined the line of theory on treaties. Ever since the first phase of the Soviet state, when sheer necessity forced the Soviet Government to enter into relations with other states, the ideal instrument of such relations was international treaties and agreements, the great majority of which were bilateral (between 1917 and December 31.

⁶⁶ Not counting Monaco, Liechtenstein and Andorra, the U.S.S.R. has had *some* treaty relations with all the countries of the world except the Republic of Korea, South Vietnam, and the Vatican City. (In the Soviet usage, the term "treaty" covers all agreements between governments founding relationships in international law, whatever their name, but excluding oral agreements).

⁶⁷ For summaries of Lenin's and Stalin's views on treaties as a source of international order between the Soviet Government and other governments, see G. P. Zadorozhnyi, "Voprosy mezhdunarodnogo prava v proizvedeniakh Lenina i Stalina" (Problems of International Law in the Works of Lenin and Stalin), in Ye. A. Korovin (ed.), *Mezhdunarodnoe pravo* 101 (Moscow, 1951); Ye. A. Korovin, "Vklad SSSR v mezhdunarodnoe pravo," (The Soviet Contribution to International Law), *Sovetskoe gosudarstvo i pravo*, No. 11(1947), p. 23; and F. I. Kozhevnikov, "I. V. Stalin ob osnovnykh printsipakh sovremennogo mezhdunarodnogo prava" (J. V. Stalin on the Basic Principles of Contemporary International Law), *Sovetskoe gosudarstvo i pravo*, No. 12 (1949), p. 104.

⁶⁸ These figures are provisional and subject to revision, but may be taken as established minima.

1922, the Soviet Government concluded more than 250 treaties and agreements, of which approximately 225 were bilateral).

At first, these treaties were couched in the semantical stereotypes of traditional treaty practice and were based on principles of traditional international law. A minority of Soviet treaties contained Marxist ideological provisions, but these stipulations were isolated, far from systematic and lacked any uniting principle. If there was any underlying principle at all, it was the Soviet expectation of the benefits or at least the removal of danger a given treaty might bring about, and a given treaty partner was therefore to a high degree the determinant of both the language and the principles emphasized. As Korovin pointed out in 1924, this obvious mixture of principles and motivations in Soviet treaty practice in the early period, which "drew arguments in articles and paragraphs [both] from extracts of treaties concluded by the [Russian] Imperial Government" and from Marxist-Leninist ideology, "resulted in an entirely ambiguous situation."⁶⁹ Consequently, there was in the earliest period no Soviet theory on treaties.

Once formal diplomatic relations with foreign Powers had been established and the Soviet Government had been recognized by the leading foreign Powers, the Soviet theory on international treaties began to take form. Lagging behind Soviet practice in time, theorists now had certain governmental practices to follow, to systematize, to analyze in terms of official ideology, and to justify and defend. Just as Soviet treaty practice during the period 1917-1922 can be characterized as a mixture of traditional and revolutionary principles, so Soviet scholars in the period 1923-1928 selected elements from this mixture in order to elaborate a systematic Soviet doctrine of treaties.

For the Soviet theorists of this period, just as for those who have followed them up to the present time, international treaties retained the crucial significance they had in Soviet practice from the beginning. As has been pointed out above, Korovin saw in treaties signed by the Soviet Government a bridge between the traditional and revolutionary systems recognized by both.⁷⁰ This was a reflection of the Soviet practice. Relations between the U.S.S.R. and the rest of the world were to be built on solid, businesslike foundations; utility, expediency, and the exaggerated Soviet criteria of security have always been best served by the instrumentality of international treaties. And, given the limitations superimposed by Soviet ideological objectives, the Soviet passion for sovereignty and explicit consent, the exclusively reciprocal character of treaties, and the essential adaptability of treaties to fit particular, concrete situations, the Soviet preference for treaties as instruments of relations with other countries is understandable. Khrushchev, flexible, pragmatic, adaptable, and with all the rich experience of the Soviet past to learn from, has plunged into treaty relations—bilateral, plurilateral, and multilateral; with all kinds of partners—capital-

⁶⁹ Korovin, *Mezhdunarodnoe pravo perekhodnogo vremeni*, *op. cit.* 5.

⁷⁰ *Ibid.* 75; *Sovremennoe mezhdunarodnoe publichnoe pravo*, *op. cit.* 7.

ists, socialists, Communists, and satellites; and on all kinds of subjects—political, military, economic, communications, legal, cultural and health.

2. Ever since Pashukanis' unequivocal exposition, *international custom* has been accepted by nearly all Soviet scholars as a second but still fundamental source of international order. Kozhevnikov's assessment of the value of international custom—

Regardless of the uncertainty, instability and relativity of international custom, it would be incorrect to underestimate, let alone to ignore its significance as a source of law for international relations⁷¹—

became classic. And again, this was so entirely because of Soviet needs in international relations: Why should "the Soviet Government be deprived of those rights which require no treaty formulation and derive from the very fact that normal diplomatic relations exist?"⁷² Soviet practice found international custom most useful; theory reversed itself and produced international custom as the second basic foundation of order in relations between the Soviet Union and the rest of the world.

3. Soviet scholarship after World War II began to stress, as another fundamental source of international law, *basic "concepts and principles"* of international law. These *could* be viewed as the Soviet interpretation of the general principles of law of Article 38, paragraph 1(c), of the Statute of the International Court of Justice. Various understood as "legal analogies, natural law, general principles of justice" et cetera, in the West,⁷³ the general principles of law became for most Soviet theorists a series of "basic laws, norms and concepts" of legal, political, ideological and ethical content. The great majority of these principles have their origins, in one way or another, either in traditional international law or in treaty law and thus have been accepted, or are acceptable, universally. The fact must never be lost sight of, however, that while the *terms* in which the principles are formulated by Soviet writers may be similar to or identical with those employed in the West, the *content* and *significance* of the principles are often given a completely different interpretation in the Soviet and non-Soviet worlds.

4. *Decisions of international organizations* such as the League of Nations, the United Nations, international courts such as the Permanent Court of International Justice and the International Court of Justice, and other "permanent and temporary" international organizations, conferences and agencies have been, more often than not, viewed by Soviet writers as "an important source of international law" for the member states, "provided that they were [so] recognized and applied in practice."⁷⁴ Such decisions "do not always receive proper attention, in spite of [their] great significance and the importance of the role which [they] play," complained Krylov, out of his extensive judicial experience. This is true: Soviet scholarship, just as Soviet and Western practice, has viewed such decisions

⁷¹ Note 24 above.

⁷² Pashukanis, Ocherki, *loc. cit.* (note 14 above).

⁷³ Briggs, *The Law of Nations*, *op. cit.* (note 30 above) 48.

⁷⁴ Krylov in Durdenevski and Krylov, *op. cit.* 25.

as subsidiary sources of international law; nor does Krylov's complaint appear to have had any practical effect in altering this situation.

Similarly, (5) *decisions of national courts*, (6) *domestic legislation*, (7) *doctrine*, (8) *the codification of international law*, and (9) *collision norms* have been, when recognized, considered auxiliary and secondary sources; however, the pronounced over-all tendency has been gradually towards more and more recognition of these factors. *International morality* and *international comity* have been generally, though not exclusively, rejected by Soviet practice and theory.

IV

In the forty-year period of the existence of the Soviet state the metamorphosis of Soviet practice and theory on sources of world order has been profound. Theory evolved from the original position—international treaties *and very little else*—to the present point of view—international treaties *and* international custom, general principles (concepts and norms) of international law, decisions of international organizations, decisions of national courts, domestic legislation, et cetera. As a consequence, the Soviet hierarchy of sources has come to resemble quite closely the generally accepted Western pattern. There are differences, to be sure:

(a) International conventions, both general and particular, still tower over other sources for Soviet theorists.

(b) The difference in "motivations" leading to conclusion of international treaties has always been solemnly pointed out. Ever since Lenin, Soviet writers claim,

The Soviet state viewed international treaties as a serious means in the struggle for peace, for the victory of communism [sic]. On the other hand, the imperialist states exploit international treaties to mask their aggressive goals and legally to secure the dependence of small states. International treaties in the hands of the imperialists become new legal forms of colonialism (Baghdad Pact and SEATO) and a cover-up for aggression (North Atlantic Pact). V. I. Lenin used to characterize such international treaties as "treaty-conspiracies."⁷⁵

(c) Selectivity and eclecticism are applied to *all* sources under the criterion of "democratic principles," to be read "consent of the Soviet Union." In other words, the U.S.S.R. accepts those norms as foundations of international order which it recognizes itself or which it views at least as not in opposition to the goals of Soviet foreign policy; such norms are made binding by the acceptance of the Soviet state. Hence the "cornerstone" of absolute sovereignty and the Soviet advocacy of primacy of national over international law.

(d) There is an old distinction which is still preserved between substantive and formal sources of international order in the Soviet doctrine: *Substantive* (or material) sources of order are the "real foundations" which,

⁷⁵ A. N. Talalaev, "V. I. Lenin o mezhdunarodnykh dogovorakh" (V. I. Lenin on International Treaties), *Sovetskoe gosudarstvo i pravo*, No. 4 (1958), p. 24. The reference is to Lenin, *Sochineniia*, Vol. 23, p. 116.

in Marxist theory, condition the origin and the development of all order, namely, the productive relations characteristic for each society. That class which controls the means of production in a society is the class which forms and determines order and its concrete content. In relations among states the substantive sources, because of the presence of both socialist and capitalist systems, are and must be struggle, co-existence and competition.⁷⁶ And struggle, co-existence and competition among states are the material basis of international order which is manifested in the formal, external, legal sources: international treaties, international custom, general principles of international law, decisions of international organizations, et cetera.

(e) What the Soviet authors call basic "principles," "laws," or "norms" of international law are

the basic foundations which rule international relations in a definite historical epoch and which possess binding force for all states irrespective of whether or not they become valid through international custom or international treaty. They possess special significance for the establishment of legality in international relations. That is why the Soviet doctrine not only recognizes but especially stresses the existence of basic principles of international law.⁷⁷

However, these and similar differences are primarily doctrinal and in fact have little to do with actual Soviet treaty practice; they do matter, but play a rôle which is far from decisive even in Soviet scholarship. It is significant that a recent volume of selected documents on international law published in Moscow in 1957⁷⁸ carries under the heading "Sources of International Law" these items: 1. Article 38 of the Statute of the International Court of Justice; 2. Resolutions of the General Assembly of the U.N. on progressive development of international law and its codification (accepted by the General Assembly in the second part of the Second Session in New York on Dec. 11, 1946); 3. Decision concerning establishment of the International Law Commission of the U.N., Nov. 21, 1947; 4a. Organization of the International Law Commission as accepted on Dec. 18, 1946; 4b. Functions of the International Law Commission; and 4c. Co-operation of the International Law Commission with other organs. *No other documents* are included in the section on sources.

On the other hand, the Western view on sources of international law has not stood still in the last forty years either. International custom used to be universally viewed as "the most important source of international law" forty years ago.⁷⁹ Today it is regarded as only one of the two most important sources, and in general as the second one on the scale. This fact, at least partly, owes its origin to the presence of the Soviet Union in the world community; as Charles De Visscher aptly put it,

⁷⁶ Krylov in Durdenevski and Krylov, *op. cit.* 20.

⁷⁷ *Diplomaticheskii slovar'*, *op. cit.*, cols. 124-125.

⁷⁸ *Mezhdunarodnoe pravo v izbrannykh dokumentakh*, *op. cit.* 12-21.

⁷⁹ See, for example, Charles G. Fenwick, *International Law* 69 (3rd ed., New York, 1948).

Acceleration of history, and above all *diminishing homogeneity in the moral and legal ideas that have long governed the formation of law*—such, in their essential elements, are the causes that today curtail the development of customary international law.⁸⁰

International custom "is not adequate to the needs of a world that changes with unprecedented speed";⁸¹ international treaties—flexible, decentralized, rational, specific, adaptable, innovating and stabilizing—were bound to take over where international custom, surer but slower, was proved wanting.⁸²

We may conclude, then, that after forty years of "struggle," "co-existence," and "competition," there is a fairly close similarity between Soviet and Western views on the sources of order in international relations, and that in both, international treaties are of primary importance.⁸³

⁸⁰ Charles De Visscher, *Theory and Reality in Public International Law* 156 (Princeton, 1957). Italics added.

⁸¹ *Ibid.* 268. See also Covey T. Oliver, "Contemporary Problems of Treaty Law," 88 *Hague Academy Recueil des Cours* 421-506 (1955, II), which is essentially an eloquent plea for the salvation of international law through increased attention to international treaties. Professor Oliver lists treaties as the first and most important source of international law (pp. 453 ff.)

⁸² Similarly, the old distinction between treaty-contracts and treaty-laws, which the Soviet doctrine has rather consistently played down (*cf.* Korovin, Pashukanis, Kozhevnikov, Krylov et al., above), is at present minimized in the West as well, and both types of treaties are viewed as essential in the process of creation of norms of international order today. As J. G. Starke pointed out in his conclusion to "Treaties as a 'Source' of International Law," 23 *Brit. Year Book of Int. Law* 346 (1946), not only treaty law but "the operation of treaty-contracts in the creation of rules of international law is generically part of the process whereby usage and practice crystallize into custom; and because of the peculiar authority of treaties the process is invested with additional value and weight. For this reason, apart from their constitutive effect, these treaties may often be of considerable evidential importance."

⁸³ The conceptual evolution which we have traced is a continuing process. A recent authoritative Soviet statement on the subject is provided in an address by Professor G. I. Tunkin, "Forty Years of Co-existence and International Law," which was read at the first annual session of the newly-organized Soviet Association of International Law held in Moscow, January 30 to February 1, 1958 (*International Affairs (Moscow)*, No. 3 (1958), p. 125). Professor Tunkin recognized only two sources of "general international law": international treaties and international usage. He nevertheless "pointed out that new progressive principles and norms . . . have appeared in general international law," for example, "the prohibition of the use of force in international relations."

EDITORIAL COMMENT

LEGAL ASPECTS OF THE BEIRUT LANDING

If Americans pause to consider and discuss the legal aspects of the action of the United States in landing Marines at Beirut on July 15, 1958, it is primarily for their own information and intelligence and that of their friends in other countries, and possibly that of people in so-called neutralist countries who may still be open to understanding in this matter. Assuredly it is not with any idea of impressing the governing groups in Iron Curtain countries or even, perhaps, great masses of people or any independent individual thinkers therein. The historic Russian negative attitude on the treatment of social and political problems by juridical methods,¹ recent actual professions and performances on this score by the Soviet bloc, and the resulting quite tenuous possibility of accomplishing anything along this line, preclude any such illusion.

The problem of intervention was once a very acute and very important issue under international law.² For generations or centuries the right of one state to intervene in the affairs of another state, especially to take military action in the territory of another state, short of war, on various grounds, was debated vigorously and at length—more or less out of proportion to the number of instances wherein such action was undertaken—as a result of the growth in national spirit and national independence in the eighteenth and nineteenth centuries. In more recent times this historic debate has declined somewhat, and also the practice of intervention, without the historic issues of principle ever having been settled. This may be traced in part to the success of proponents of national independence in repelling the right of intervention and, paradoxically, to the striking development of collective intervention, as it was formerly called, or police action by international organizations, particularly, of course, though not exclusively, by the League of Nations and the United Nations, a development already foreseen by students of the problem.³

The most plausible ground for the recent landing of military forces of the United States near Beirut is to be found in the invitation of the duly elected Government of Lebanon, an invitation extended on July 14, more or less simultaneously with a revolt which overthrew the legitimate government in Iraq, but some time in contemplation and based upon alleged indirect aggression against the Government of Lebanon by

¹ See A. Nussbaum, *A Concise History of the Law of Nations* 248 and 285 (New York, Macmillan, rev. ed., 1954).

² See lectures by present writer at the Académie de Droit International at The Hague, 1930, 32 *Recueil des Cours* 607–690, esp. 640–657 (Paris, Recueil Sirey, 1931).

³ Potter, *loc. cit.* 661, 678; and H. Wehberg, lectures on “La Police Internationale,” 48 *Hague Academy Recueil des Cours* 7–131 (1934).

outside forces or governments, and a resulting insurrection (to employ a classic but somewhat outmoded term) against itself.⁴

Such invitations had not been unknown in the past and had always been regarded as adequate bases for intervention, if such it could be called in these circumstances. On the other hand, two or three closely related problems remain to be considered in this connection. Was the invitation prompted by pressure, for political reasons, from the government to which it was extended? Was the allegation of aggression from outside justified by the facts? And how assess the relative merits (ethical and legal) of the concepts of orderly government and the "right" of revolution—at one time hotly avowed by the United States?

To the first of these questions, the answer seems to be simply that there is no evidence of United States pressure in the situation, although clearly the attitude of this country (the "Eisenhower Doctrine") was well known in Beirut and, that, moreover, such hypothetical collusion, if such it might be called, would not legally invalidate the invitation. Secondly, it clearly appears that there did exist a certain amount of external aggression or subversive action from certain quarters, in spite of Russian and Egyptian complete denials, although not so "massive" as alleged by President Chamoun, if the reports of the United Nations observatory commission are accurate.⁵ And thirdly, it has to be admitted, to the distress of the shades of Jefferson, Paine, and many other patriots in many lands, that legally there is no right of revolution, at least in the absence of illegal action on the part of the established government. It might be added that if this first ground for "intervention" (invitation) could be established, it would not be necessary to go on to establish other grounds.

A second plausible basis for "intervention" in the instant situation, as in so many such cases, is to be found in the right to use force for the protection of nationals, and their property, of the intervening state, in absence of ability or willingness of the local state to perform this function.⁶ While well established in principle, however, such a right obviously depends upon proof of the need for such action under the conditions cited. In the present case there seems to have been actual and serious danger to United States citizens and their interests, and some inability, though not unwillingness, on the part of the Lebanese Government to protect them. President Eisenhower did not fail to invoke this basis for United States action at Beirut.

⁴ No text of the Chamoun appeal has been published, according to consultation with the White House, the Department of State, the Embassy of Lebanon and the New York Times. President Chamoun appealed to President Eisenhower through the U. S. Ambassador in Beirut, who cabled the President. See 39 Dept. of State Bulletin 181-183, 235 (1958).

⁵ Reports of the United Nations Observation Group (UNOGIL) are to be found in U.N. Docs. S/4040 (July 3), S/4051 (July 16), S/4052 (July 17), S/4069 (July 30), 1958.

⁶ For recent discussion of protection of nationals abroad, see Proceedings of the Vth International Conference of Comparative Law, Brussels, Aug. 4-9, 1958, especially the remarks of Mr. William Roy Vallance.

Finally, we have to note Article 51 of the Charter of the United Nations or the alleged right of co-operative self-defense by Member States prior to, or apart from, any action for their defense by that Organization. This ground also was cited by President Eisenhower, and indeed appeared, in the context, to loom larger or higher than the preceding contention as a justification for the action. But the difficulty with this argument is that the text of Article 51 refers to "armed attack," and such could not be, and was not, alleged by Lebanon. When the Charter was drafted, unarmed aggression was either not foreseen or not deemed suitable for inclusion among the forms of action to be forbidden and prevented.

This about completes the case for the defense, so to speak. Obviously, no larger or more general considerations such as peace and progress in the Middle East, the rivalry of Communist imperialism and democratic influence, and so on, have any legal standing in the premises. International law has not yet succeeded in regulating with complete effectiveness such concrete matters as protection of aliens and national self-defense, let alone higher political and social issues of the character just mentioned. From a strictly legal point of view the justification for the Beirut landing must be sought in the three arguments reviewed above, particularly the first and second, although the subsequent evolution of the incident has tended to give to the aspects of the situation relating to the United Nations more significance than those governable by the older and simpler international law, an evolution probably more important than the original incident in itself.

Two further questions must be raised in conclusion. One relates to the termination of such cases or such actions, and the second to the relative importance of a strictly legalistic appraisal of such actions of intervention. These two supplementary problems more or less contradict or clash, one with the other, but neither can be ignored, especially for the future, both immediate and prolonged.

Ordinarily, such an intervention would or should terminate both *de jure* and *de facto*, with much interplay between the two standards or controls, when its object had been achieved in the judgments of the intervening Power and/or the inviting Power, assuming that there had in fact been an invitation. Obviously, such line of reasoning leaves open the door for disagreement between the parties upon the merits or the needs of the situation. This potential disagreement has not failed to make itself felt—again potentially—in the present case. Such a deadlock could easily produce serious trouble, especially in view of the vagueness of the law on the matter or its willingness to leave the outcome largely to the discretion of the parties. On the other hand, the liquidation of the situation through or into United Nations consideration, discussion, and action may remove the problem of the termination of the incident onto a higher and more manageable plane.

Finally, it appears to be necessary to take account of the Russian attitude, if such it can be called, that the legalistic aspects of international relations and their legalistic regulation are not their most important aspects, al-

though the Russians have actually tried to a large extent to argue their condemnation of the instant United States action in orthodox legal terms. With the non-legalistic attitude there must be a large degree of sympathy or comprehension both from a sociological viewpoint and especially in view of the present (sic) state of international law. Such an attitude cannot, however, in view of all considerations, both logical and practical, be pushed to the point of repudiating legalistic technique entirely or abandoning any attempt to treat such cases, including the present case, according to accepted legal standards. According to such standards the Beirut landing can clearly be justified, although the two broader aspects of the situation already mentioned cannot be forgotten.

PITMAN B. POTTER

THE GENEVA CONFERENCE ON THE LAW OF THE SEA;
A STUDY IN INTERNATIONAL LAW-MAKING

Elsewhere in this issue the Geneva Conference on the Law of the Sea is fully described, and it is unnecessary here to repeat the facts which have been stated by Mr. Arthur H. Dean and Miss Marjorie M. Whiteman.¹ This comment concerns itself with the methods and procedures which were utilized in what was distinctly an exercise in international law-making.

The law of the sea is one of the oldest branches of international law. Seafaring peoples have from the earliest days known the utility of rules or common practices, just as much as they have spawned marauders and pirates. Much of the law of the sea which is applied commonly in the courts of many countries today is not "international law" in the sense in which that term is employed by those concerned with public international law. But the Supreme Court of the United States has found in maritime law a focus for a continued assertion of the existence of a customary law which has developed outside of any one national jurisdiction. In this field it is content to find that there is law and it does not feel compelled to assert that the matter is "political" in the sense that, under the separation-of-powers doctrine, the matter lies within the functions of the executive or legislative branches of the Government. On the other hand, there is much maritime law which is distinctively "public international law" whether one considers the type of jurisdictional problem raised in the *Lotus* case, or whether one refers to the right of innocent passage, the immunities flowing from entry in distress, or the more modern doctrines concerning the exploitation of the continental shelf.

There have been many attempts to make the law of the sea more precise. Leaving aside that abundant source of law which for centuries determined the respective rights of belligerents and neutrals and which was regularly and generally impartially applied by national prize courts, one recalls that international jurisprudence has played a distinctive part: *The Costa Rica Packet*, *The Bering Sea* and *North Atlantic Coast Fisheries Arbitrations*, *The I'm Alone*, the *Norwegian Fisheries Case*, for example. Treaties on

¹ See above, pp. 607, 629.

the subject, bilateral, regional and multilateral, are numerous and many of them have regulated in very practical ways the acute problems which confront seafaring men. The law of the sea, with skillful guidance from those closely concerned, has developed also through the adoption of uniform national laws, and through the customary utilization of common documents and practices.

The efforts of the League of Nations to contribute to the "codification" of international law included abortive attempts in 1930 at agreed statements on the law of territorial waters. Undaunted, the International Law Commission of the United Nations addressed itself to the statement or restatement of the law of the sea. The work began in 1949 when, at its first session, the International Law Commission included the "Regime of the High Seas" among the subjects to which it should give priority. In 1950 the General Assembly recommended work also on territorial waters, to which the Commission forthwith addressed itself in 1951. The *Rapporteur* for both topics was the Netherlands jurist, Professor J. P. A. François. The work continued with submission of drafts to governments and consideration of governmental replies, until in February, 1958, responding to the Commission's initiative, the United Nations Conference on the Law of the Sea, convened by resolution of the General Assembly, began its nine-weeks' session with eighty-six countries in attendance.

The national delegations included experts not only on law but also on technical fishery problems and on geography and oceanography and comparable sciences. In contrast to the League Codification Conference of 1930, one gets from the outside the impression that this was a conference ready and able to address itself to the practical maritime problems which confront the world seafaring community (and indeed even the vigorous bloc of landlocked states which was in attendance).

It is certainly not surprising that agreement was not reached on all problems; the measure and extent of agreement was surprising. The International Law Commission should be gratified to recall that its draft proposals were generally the basis of discussion and in many instances were adopted either without changes or with minor ones. A rather superficial examination of the voting suggests that there was no uniformity in the line-ups. States voted together on some articles and opposed each other on others. The natural implication is that the voting in general was not political in the sense of reflecting the traditional separation of the Soviet bloc from the rest of the world—though instances of this situation are to be found. There were clear divergencies of view—reflected in votes—as between the United States and the United Kingdom and as between Canada on the one hand and the United States and the United Kingdom on the other. The voting in these instances seems to have followed national interests as interpreted by the governments which instructed the delegations and which were no doubt in some instance influenced by the economic (fishing) interest of influential groups of their nationals. Other types of national interests no doubt also affected the votes on such matters as the articles adopted regarding the use of flags of convenience.

The Conference adopted five conventions and nine resolutions.² At the Conference and in some of the comments on its proceedings, importance seems to have been attached to the size of the votes on various drafts in the committees and even in the plenary sessions of the Conference itself. It would seem to be true, however, that the size of the vote on any particular proposition is relatively immaterial, the interesting question being whether the principal or very important maritime states were voting with the majority or the minority. Of course no one would have ignored the fact that the action of the Conference did not "make" international law—or did it? If the International Court of Justice, for example, were now called upon to rule specifically upon the extent of territorial waters off an uncomplicated coastline, would it deduce from the records of the Conference that there was no international law of the subject? Or would it conclude that, since there was no agreement upon stating an extent greater than three miles, this traditional limit still stands as that established by international law in the absence of particular agreement or special geographical factors? Is a conference resolution on fishery conservation, adopted by unanimity but concluding merely with a recommendation, of less jural consequence than a convention adopted by majority vote of the conference and subsequently ratified by x number of states? Is it not important to see which states are included among those which actually become parties to the conventions?

Naturally one looks at the language of the various conventions. One notes, for example, that the Convention on the Territorial Sea and Contiguous Zone and the Convention on the Continental Shelf begin with the simple statement that "The States Parties to this Convention have agreed as follows:", whereas the Convention on the High Seas declares that "The States Parties to this Convention, Desiring to codify the rules of international law relating to the high seas, Recognizing that the United Nations Conference on the Law of the Sea . . . adopted the following provisions as generally declaratory of established principles of international law, Have agreed as follows:". The difference is certainly significant. The Convention on Fishing and Conservation of the Living Resources of the High Seas is clearly drafted in terms of a legislative (albeit by agreement) act recognizing need and then adopting measures to meet the need. The Optional Protocol of Signature Concerning the Compulsory Settlement of Disputes is also clearly of another nature entirely.

The debates in the Conference would naturally contribute further evidence of what states consider to be "a general practice accepted as law." Thus the statement by Mr. Dean for the Delegation of the United States³ on the closing day of the Conference clearly distinguished between the assertion of the United States that the three-mile rule is the existing international law, and the compromise suggestions advanced by the United States with a view to reaching general agreement on the subject.

² U.N. Docs. A/CONF. 13/L.52-57, printed in 38 Dept. of State Bulletin 1111 ff., and below, at p. 834.

³ Dept. of State Bulletin, *loc. cit.* 1110.

If the drafts prepared by the International Law Commission continue to serve as bases of discussion at practical international conferences, and if they are frankly drafted for that purpose, it is quite possible that significant progress can be made along many lines through the same type of procedure as that followed at the Geneva Conference on the Law of the Sea. But the proof of this pudding is in the ratifications of the several conventions and in the implementation of the recommendations.

PHILIP C. JESSUP

THE GENEVA CONVENTION ON THE CONTINENTAL SHELF:
A FIRST IMPRESSION

The Convention on the Continental Shelf, adopted at Geneva on April 26, 1958, by the United Nations Conference on the Law of the Sea, represents the first great effort to determine by an act of international legislation the scope of the continental shelf doctrine in international law.¹ The fact that the Convention was finally approved by a vote of 57 to three, with only eight abstentions, is evidence both that a need for rules on the subject was generally felt and that the rules embodied in the Convention were considered on the whole acceptable. In view of the wide disagreement at the Conference on other aspects of the law of the sea, this consensus regarding the shelf is not a negligible achievement. The Convention is not law, of course, and according to its terms will not be binding even on the parties until 22 ratifications or accessions have been received; but it is in any case highly significant as an agreed statement of principles.

The Convention itself reflects in general a moderate approach, and this also is an achievement in which its framers may take satisfaction. Extravagant claims of the kind which in recent years have threatened to reduce the shelf doctrine to absurdity will gain from it little support. It notably rejects the view that the doctrine justifies claims to vast offshore areas regardless of depth or exploitability, or that it entitles a coastal state to exercise unlimited jurisdiction over the waters above the shelf. On the contrary, the general principle is explicitly affirmed that the shelf doctrine does not affect the established legal order of the high seas. Nevertheless, despite these substantial merits, the Convention cannot be regarded as a wholly satisfactory instrument. It is quite good, but not quite good enough. It leaves many serious uncertainties unresolved, more perhaps than should be permitted to pass even in a first attempt. This does not mean that it should be repudiated, but rather that its inadequacies should be promptly recognized for what they are. Some, no doubt, can be the objects of later improvement; others, it must be feared, are now irreparable and must be viewed as part of the price paid for any agreement at all.

The Convention as a whole closely follows the draft articles on the

¹ The final text of the Convention appears in U.N. Doc. A/CONF.13/L.58 (the Final Act of the Conference), and also separately in Doc. A/CONF.13/L.55, printed below, p. 858. It consists of versions in English, French, Russian, Chinese, and Spanish, each version being declared equally authentic. See article by Marjorie M. Whiteman, above, p. 629, for full documentation on the Conference discussion of the subject.

continental shelf prepared by the International Law Commission. These constituted Articles 67-73 of the Commission's comprehensive 1956 Draft on the Law of the Sea, which formed the basic working paper of the Geneva Conference.² All but one of the seven articles, plus a certain amount of additional matter obtained largely from the Commission's commentary, are included in the Convention. The exception is Article 73, which provided for the settlement of shelf disputes by the International Court of Justice or other peaceful means. This provision was suppressed in its entirety, but the Conference adopted instead an Optional Protocol on the Settlement of Disputes, applicable to all the instruments it prepared. In its final form, the text consists of fifteen articles, seven devoted to substantive principles and eight relating to procedural and formal matters. The principal shortcomings in the document center around Articles 1 and 2, relating to the definition of the shelf and to the nature and scope of the rights attributed to the coastal state, and it is to these articles that the following comments are chiefly directed.

V Article 1 of the Convention defines the continental shelf as "the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas"; and the definition is expressly said to include "the seabed and subsoil of similar submarine areas adjacent to the coasts of islands." This language, although not particularly felicitous in style, closely follows the final International Law Commission draft in providing alternative criteria for determining the outer limit of the shelf. The first of these, the line at which the coastal waters attain a depth of 200 meters, is the familiar rule derived from the geological concept of the average shelf edge, although in any particular instance the edge of the geological shelf may actually occur at either a greater or a lesser depth. The second alternative appears to fix as a limit the line, at a depth greater than 200 meters, beyond which deep water makes it in fact impossible to exploit the resources of the seabed and subsoil.

The first paragraph of Article 2 repeats almost verbatim the Commission's draft Article 68, declaring the "sovereign rights" of the coastal state over its continental shelf. Three additional paragraphs transfer to the text of the Convention principles which the International Law Commission had mentioned only in its commentary. Paragraph 2 affirms that the sovereign rights are exclusive, whether or not they are actually exercised by the coastal state, and paragraph 3 asserts that their validity is not dependent on any concept of occupation or on any express claim by proclamation. The Convention thus adopts the view that rights over the shelf arise *ipso jure* in favor of the coastal state, presumably in much the same manner as a belt of territorial sea is automatically attributed by the law to every coastal state. While this approach is doubtless the soundest and

² The text of Arts. 67-73, together with a commentary, is printed in the Commission's Report of its 8th Session, 1956 (U.N. Doc. A/3159), pp. 41-45; 51 A.J.I.L. 242-253 (1957).

simples, these paragraphs cause some difficulty when read in conjunction with Article 1.

Under the terms of Article 1, the sovereign rights recognized by Article 2 extend at the minimum to the 200-meter-depth line offshore. But under the alternative rule in Article 1, they may extend still further to the outer limit of possible exploitation. The inclusion of some such provision is probably necessary, for the technical progress made in the last decade alone indicates that exploitation at depths greater than 200 meters may well be commercially feasible in the near future. Yet the criterion proposed in the present text introduces a continuing uncertainty about the precise extent of offshore claims, for the possibility of exploitation is a variable factor dependent on the state of technology at any given time. The uncertainty would be less if the rule required, as the basis of rights, actual exploitation of the resources beyond the 200-meter line; but this is not the case. Under paragraphs 2 and 3 of Article 2, a coastal state's rights over its shelf exist irrespective of any actual activity or occupation. Hence every coastal state would seem entitled to assert rights off its shore, out to the maximum depth for exploitation reached anywhere in the world, regardless of its own capabilities or of local conditions, other than depth, which might prevent exploitation. Who is to say with authority, in the absence of actual trial, that a maximum depth reached off one state can or cannot be reached off another? It is not difficult to envisage the confusion and controversy which must arise in the course of ascertaining, verifying, and publishing the latest data on such a maximum depth. And confusion will be compounded if any substantial group of states with offshore interests are not parties to the Convention.

It may be said that the problem of fixing a precise limit for the shelf under the Convention definition, though real enough, is not of great practical importance. This may be true, at least for a time. But no rule which leaves offshore limits of jurisdiction so hazy can be regarded as adequately stated. The manner in which the shelf doctrine in some cases has already been distorted so as to encroach on the freedom of the high seas should be a warning.³ It is probably unprofitable to speculate whether it would not have been preferable to adhere to a fixed limit set at a specific depth, even if that were greater than 200 meters—perhaps with the additional proviso that if exploitation actually were carried out at a greater depth, rights should accrue accordingly. But as a matter of practice under the Convention, it might be possible for each party to file periodically with the Secretary General of the United Nations a statement indicating the maximum depth at which it was exploiting the resources of its shelf.

³ The cautionary remark of Professor Scelle—always a critic of the continental shelf doctrine—at the 357th meeting of the International Law Commission (May 31, 1955) may be recalled in this connection: "It was not surprising that difficulty was experienced in evolving a precise definition of a term which was essentially indefinable. Adoption of the concept whereby the continental shelf extended as far as exploitation of the natural resources of the seabed was possible would tend to abolish the domain of the high seas." I.L.C. Yearbook, 1956, Vol. I, p. 135.

The greatest such figure, established to the satisfaction of the Secretary General, would determine the outer shelf limits for all parties until the next succeeding report.

The fourth paragraph of Article 2 raises other questions of a different but also controversial nature. This provides that the natural resources subject to the shelf regime shall include "living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the sea-bed or are unable to move except in constant physical contact with the sea-bed or the subsoil." The text is traceable to a 1953 decision of the International Law Commission, in which the Commission resolved to bring "sedentary fisheries" within the scope of the shelf doctrine.⁴ That action, which reversed the Commission's own view two years earlier, was carried by less than a majority of the members and in the face of strong dissent.⁵

There are persuasive arguments, both scientific and practical, for the contention that so-called "sedentary fisheries" do not properly belong under the shelf regime. Logically, it would seem that the dividing line between the two domains could best be drawn between animate and inanimate resources. Biologically, it is extremely difficult to define satisfactorily a "sedentary" species. Practically, the living resources of the seas are so intimately dependent on one another that the regulation of some species under one regime and of others under another is bound to create problems. Legally, the unilateral regulation of any fishery in the high seas is a dubious proceeding, and creates a serious hazard to the freedom of high-seas fisheries in general.⁶ Considering that the same Conference which framed the shelf instrument also adopted a Convention on Fishing and the Conservation of the Living Resources of the High Seas,⁷ based in general on sound scientific principles, it seems regrettable that "sedentary fisheries" should be excluded from the comprehensive arrangements envisaged in the latter document. The treatment of "sedentary fisheries" as a resource of the shelf would appear to be one of the points on which the work of the Conference may be criticized most justly.

Articles 3, 4, and 5 of the Convention are designed primarily to protect the status as high seas of waters over the shelf, to preserve the right of other states to lay cables and pipelines on the shelf, and to spell out more specifically the rights and duties of the coastal state *vis-à-vis* other users of the high seas. These articles, very similar to the views formulated by

⁴ I.L.C. Report, 5th Sess., 1953 (U.N. Doc. A/1316), p. 14; 48 A.J.I.L. Supp. 32 (1954).

⁵ The vote was six in favor, four against, three abstentions. U.N. Doc. A/CN.4/SR.205.

⁶ At the Conference the original proposal for Art. 2(4) expressly excluded "crustacea and swimming species." Although approved in committee, this clause was stricken out in plenary session. The result is to make more doubtful than ever the precise scope of the paragraph.

⁷ The text is in U. N. Docs. A/CONF.13/L.54, printed below, p. 851, and A/CONF.13/L.58.

the International Law Commission, strike on the whole a fair balance among the interests concerned. In Article 5(1) the Convention follows the final I.L.C. draft in providing that exploitation must not result in any "unjustifiable interference" with navigation, fishing, or conservation; this formulation is much preferable to the phrase "substantial interference" used in earlier I.L.C. drafts, since it recognizes the possibility that even substantial interference may be justifiable if the particular resources at stake are in fact more valuable than the other use concerned. Article 5(4), specifying that artificial installations shall not possess the status of islands or any belt of territorial sea, is probably unobjectionable at present; but it may become unrealistic if technical developments lead to the construction of true islands with areas and permanence greater than many natural islands. Here an extension of established principles relating to accretion may eventually be called for.

In dealing with the problem of boundaries on the same continental shelf, both as between states opposite one another and as between states adjacent to each other along the same coast, Article 6 rightly stresses agreement among the states concerned as the first method of solution. Only in the absence of agreement, "and unless another boundary line is justified by special circumstances," is the general rule laid down in the article to be resorted to. What constitutes "special circumstances" is not defined, and no method is provided for determining their existence, so the phrase does provide a means by which a disputant state can indefinitely delay the application of the Convention rule by pleading "special circumstances" in any particular case. Yet in view of the fact that special circumstances do exist in numerous cases, the provision seems warranted.

The rule specified in Article 6, when and if resorted to, provides that the boundary in the case of opposite states shall be the median line between their respective baselines, and in the case of adjacent states shall be a line equidistant from the nearest points on their baselines. This formula, based on geometrical principles made familiar largely through the work of the late Dr. S. Whittemore Boggs of the Department of State,¹ has merit chiefly in providing a point of departure for negotiations. Its application in complex geographical situations is not always easy; and if applied strictly, it often produces a line which is unduly complicated or which, in the light of other considerations, appears inequitable or impracticable.

A further technical difficulty in Article 6 arises with respect to its provision that boundary lines shall be constructed with reference to the respective baselines of the states concerned. This presents no problem if those states all establish their baselines on the same principles; but if one claims advanced baselines while another follows a more restrictive practice, the boundaries will be correspondingly affected to the disadvantage of the more conservative state. Presumably the draftsmen of Article 6 considered that the baselines there referred to should be those laid down in accordance with the companion Convention on the Terri-

¹ Boggs, *International Boundaries* 176-192 (1940).

torial Sea and Contiguous Zone; but there can be no assurance that the two instruments will always go everywhere together.⁹ An associated problem arising from the same situation is that a shelf boundary drawn under the rule in Article 6 may not necessarily link up with a boundary drawn through territorial waters on a different basis—thus creating a hiatus and possibly even some embarrassment. One is led by these considerations to the conclusion that, in spite of the effort in Article 6 to provide an acceptable method of determining boundaries in the event of disagreement, the only reliable boundary line remains one fixed by agreement or by the judgment of a competent tribunal.

The last substantive article of the Convention, Article 7, declares that nothing therein shall prejudice the right of the coastal state to exploit the subsoil by means of tunneling, irrespective of the depth of the waters above. While perhaps of no great importance at present, this *carte blanche* may possibly cause conflict in the future if one state seeks by tunneling to exploit resources which another is seeking to reach from installations at sea. In this connection it is not clear whether "tunneling" includes such techniques as directional drilling.

Of the eight formal articles of the Convention, Articles 12 and 13 are of particular significance. Article 12 permits reservations to be made to any articles except the first three, and it seems quite likely that advantage may be widely taken of this permission. Much of the eventual effectiveness of the Convention, if it enters into force at all, will depend on the number and nature of such reservations. Article 13 provides that, after a five-year period from its entry into force, any party may ask for a revision of the Convention and the General Assembly shall then determine the steps to be taken regarding such request. This valuable provision opens the way to a re-examination of the Convention in the light of experience.

When and if such a re-examination occurs, some of the misgivings discussed here may be found to have been without substance, while other and unexpected difficulties will have come to the fore. Pending revision, however, it would seem most helpful to the orderly development of law in this field if the Convention were to receive as wide acceptance and support as possible. It is far from perfect, but insistence on perfection should not be allowed to stifle a promising beginning. Those who view any innovation with alarm must recognize the need for law to keep abreast of technological progress; while those who see in the Convention undue restrictions on their claimed rights may well consider that the alternative of continuing disorder is not a sound foundation for any rights at all.

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⁹ The text of the Convention on the Territorial Sea is in U.N. Docs. A/CONF.13/L.52, printed below, p. 834, and A/CONF.13/L.58. Even within the limits of that Convention, it would seem possible for states to disagree over the proper positions of baselines.

RADIO PROPAGANDA—A MODEST PROPOSAL

Once again the attention of students of international law and relations has been directed to the use of propaganda as an offensive weapon of power politics. President Eisenhower, in his historic speech last August before the United Nations, included in his comprehensive plan for the Middle East a proposal for a system of monitoring inflammatory broadcasts.¹

The problem of establishing controls over communications of a nature to cause misunderstanding, induce subversion, and incite nations to hatred and even to war, is one of extreme difficulty. Diplomats and jurists in the halls of both the League of Nations and the United Nations have wrestled valiantly with it, and it has been explored by leading authorities, notably Lauterpacht, Hyde, and Quincy Wright.² In the inter-war period, valuable contributions to an understanding of the subject were made by Preuss, Van Dyke, and others.³ Lately, however, particularly since World War II, the subject has been largely neglected by the international lawyer at the same time that it has been given ever-increasing attention by the power politics school.⁴

In the field of law, both international and municipal, there exists already a considerable body of norms which may be invoked against states claimed to be guilty of employing harmful propaganda. Thus, Oppenheim states on the basis of an impressive list of authorities:

while subversive activities against foreign states on the part of private persons, do not in principle engage the international responsibility of a state, such activities (i.e., revolutionary propaganda), when emanat-

¹ 39 Dept. of State Bulletin 337-342. (1958). President Eisenhower stated as follows: "I believe that this Assembly should reaffirm its enunciated policy and should consider means for monitoring the radio broadcasts directed across national frontiers in the troubled Near East area. It should then examine complaints from these nations which consider their national security jeopardized by external propaganda." *Ibid.* 339.

² 1 Oppenheim, *International Law* 293 (8th ed., Lauterpacht, London, 1955); Lauterpacht, "Revolutionary Propaganda by Governments," 13 *Grotius Society Transactions* 143 (1928); *idem*, "Revolutionary Activities by Private Persons against Foreign States," 22 *A.J.I.L.* 105 (1928); 1 Hyde, *International Law, Chiefly as Interpreted and Applied by the United States* 606 ff. (Boston, 1945); Wright, "The Crime of 'War-Mongering,'" 42 *A.J.I.L.* 128 (1948); also Stone, *Legal Controls of International Conflict* 318-323 (New York, 1954), and Fenwick, "The Use of Radio as an Instrument of Foreign Propaganda," 32 *A.J.I.L.* 341 (1938).

³ Preuss, "La répression des crimes et délits contre la sûreté des Etats étrangers," 40 *Rev. Gén. de Droit Int. Public* 606 (1933), and "International Responsibility for Hostile Propaganda against Foreign States," 28 *A.J.I.L.* 649 (1934); Van Dyke, "The Responsibility of States for International Propaganda," 34 *ibid.* 58 (1940).

⁴ Morgenthau, *Politics Among Nations* 136 ff., 346 ff. and *passim* (2d ed., New York, 1955); Haas and Whiting, *Dynamics of International Relations*, Ch. 9, "Propaganda and Subversion" (New York, 1956); Palmer and Perkins, *International Relations* 189 ff., Ch. 6, "Propaganda and Political Warfare as Instruments of National Policy" (Boston, 1953). For the importance of communications in the present approach to the study of international relations, see Wright, *The Study of International Relations*, chapters on International Communication, International Education, the Psychology of International Relations, and *passim* (New York, 1955).

ing directly from the government itself or indirectly from organizations receiving from it financial or other assistance, or closely associated with it by virtue of the constitution of the state concerned, amount to a breach of international law.⁵

Hyde expresses a similar view.⁶ Also, if it is illegal for a state to engage in aggressive war, incitement thereto, through radio propaganda or otherwise, may properly be considered a violation of an international duty.⁷ Similarly, some abusive or inflammatory international propaganda can be held to be outlawed as a type or corollary of unlawful intervention.⁸ Furthermore, since it is recognized to be illegal for a state to permit the formation of armed bands on its territory for the purpose of supporting foreign insurrection, acts of propaganda by individual groups, if waged as part and parcel of such unlawful preparations, should likewise come under the ban of the law, so that the state concerned would be enjoined to suppress or punish the authors.⁹

Municipal law also offers a means of checking abuses in the field of international communication. The numerous local laws in this field have been admirably summarized by Professor John L. Martin in a recent study.¹⁰ The more authoritarian the states concerned, especially new regimes with a profound sense of insecurity, the more numerous and the more severe such laws appear to be. Most of this legislation is of purely internal and local significance, but some is designed specifically to reduce international tensions, and otherwise forestall conflict. Some of this legislation is designed to curb subversive and war-mongering propaganda, including such activities by refugees. The wide prevalence of these rules may be evidence of the emergence of general principles of law which could be invoked as a salutary restriction on unsocial conduct by states in the field of communication.¹¹

We cannot accept the pessimistic conclusion voiced recently by one author, namely, that the wide use of hostile propaganda by so many states of the world today is proof of its legality. Numerous protests against abuses in this field should be sufficient to prevent the emergence of a rule of customary law condoning such practices. The author's assertion that "protest without further action will not necessarily preserve the rights of the state" appears to be entirely too sweeping, and does not represent the accepted view of the evolution of custom as a source of international law.¹²

⁵ *Op. et loc. cit.*

⁶ *Op. cit.* 606.

⁷ Whitton, "Propaganda and International Law," 72 Hague Academy Recueil des Cours 596 ff. (1948); Wright, *op. cit.* 132 ff.

⁸ "Intervention by Propaganda," in Thomas and Thomas, *Non-Intervention, the Law and Its import in the Americas* 273-302 (Dallas, 1956).

⁹ Lauterpacht and Preuss, cited notes 2 and 3 above, and Whitton, *loc. cit.* 588 ff.

¹⁰ L. John Martin, *International Propaganda* 109-163 (Minneapolis, 1958); Whitton, *loc. cit.* 595 and *passim*. See also Soviet and other Communist laws on "Offenses against the Peace and Security of Mankind," 46 A.J.I.L. Supp. 34, 99 *et seq.* (1952).

¹¹ Martin, *op. cit.* 55, 109 ff.

¹² *Ibid.* 173; 1 Rousseau, *Principes Généraux du Droit International Public* 129, 843 (Paris, 1944).

A number of states have accepted, through treaty, significant restrictions on their freedom to disseminate certain categories of messages, and have even bound themselves to repress certain kinds of communications emanating from private individuals. One of the earliest of such treaties was that between France and Russia, signed in 1801.¹³ Between the wars, Soviet Russia made a number of bilateral agreements by which each contracting party promised to abstain from propaganda injurious to the other. Of these treaties, the ill-fated Roosevelt-Litvinov Accord is a notable example.¹⁴ The Tangiers Agreement of 1928 between Spain, France, Great Britain and Italy, is interesting because of Article 10 stating that "Any agitation, propaganda or conspiracy against the established order in any of the Zones of Morocco or in any foreign country is prohibited."¹⁵ An agreement in 1931 between the German and Polish radio organizations bound the parties to take all reasonable steps to prevent the broadcasting over their respective stations of any material prejudicial to the spirit of co-operation and understanding in regard to politics, religion, economics, or intellectual or artistic matter.¹⁶ There were many other similar treaties between the wars.¹⁷ Since the second World War there have been only a few such instruments. The 1948 agreement between India and Pakistan is particularly noteworthy in that it contains mutual promises to

ensure that their respective organizations handling publicity, including publicity through radio and the film, refrain from and control: (a) propaganda against the other Dominion, and (b) publication of exaggerated versions of news of a character likely to inflame, or cause fear or alarm to, the population, or any section of the population in either Dominion.¹⁸

Both the League of Nations and the United Nations have shown their deep concern for the problem of propaganda. The League, spurred on by the International Broadcasting Union¹⁹ and the International Institute of Intellectual Cooperation,²⁰ and by certain private international organizations,²¹ devoted over ten years to the effort to curb pernicious propaganda. The problem of broadcasting first came before the League in 1926,²² but it was not until 1936 that an official conference was called at Geneva to draw up a convention, entitled, "Convention Concerning the Use of Broadcasting in the Cause of Peace." While this convention came to naught, its fifteen articles and seven recommendations constitute one of

¹³ Art. III, Treaty of Oct. 8, 1801, 7 Martens 386; Martin, *op. cit.* 89-90.

¹⁴ 28 A.J.I.L. Supp. 1-20 (1934).

¹⁵ 13 Martens 246 (3rd ser.), and 21 *ibid.* 70; Whitton, *loc. cit.* 622; 23 A.J.I.L. Supp. 238 (1929).

¹⁶ League of Nations Doc. 602. M. 240. 1931. IX-IX Disarmament. 1931.IX.19.

¹⁷ Martin, *op. cit.*, Ch. 5.

¹⁸ U.N. Doc. E/CN.4/Sub. 1/105, p. 29.

¹⁹ Records of the 9th Ordinary Session of the Assembly, Plenary Meetings, p. 471.

²⁰ Broadcasting and Peace 115 (International Institute of Intellectual Cooperation, Paris, 1933); Whitton, *loc. cit.* 618 ff.

²¹ Whitton, *loc. cit.* 616 ff.

²² L. N. Official Journal, 1926, p. 1191.

the most comprehensive treaties ever drafted to deal with the evils of broadcasting.²³

The United Nations has also given considerable attention to the problem. Much of its work in this field centered on the preparations for and the drafting of the Convention on Freedom of Information and of the Press (1948). Three draft conventions, two articles proposed for inclusion in a Declaration and Covenant of Human Rights and some forty resolutions were approved by the fifty-four states represented, most of them by overwhelming majorities.²⁴ It was declared to be a moral obligation for the press and other agencies of information to seek the truth without prejudice, and to report the facts without malicious intent. The conference in general stressed moral responsibilities rather than government controls as a means of solving the problem of communications dangerous to peace, but it took a forward step in strongly condemning all propaganda of a nature to provoke or encourage threats to the peace, breaches of the peace, or acts of aggression, and all distortion or falsification of news through whatever channels, private or governmental. The conference expressed the conviction that only a free press can serve to counteract the dissemination of racial and national hatred and curb propaganda of aggression toward national, racial, or religious groups. It was also voted (the United States abstaining) that the governments may impose penalties for the systematic diffusion of deliberately false or distorted reports which undermine friendly relations between peoples or states.²⁵ Another step was the adoption of the French proposal for an international right of official correction with provision for the resort to United Nations machinery if any state failed to discharge its obligations, as set forth in the convention, to make a corrected version of facts available to the information agencies in its territory.²⁶

We should also mention certain actions of the General Assembly in 1947 and 1950. In 1947, by unanimous vote, a resolution was adopted condemning all forms of propaganda of a nature to provoke or encourage any threat to peace, breach of the peace, or act of aggression, and governments were requested to promote, by all appropriate constitutional means of publicity and propaganda, friendly international relations.²⁷ In 1950 the General Assembly passed a resolution on "Peace through Deeds" condemning direct and indirect aggression as a crime against peace and security, and a resolution entitled "Condemnation of Propaganda Against

²³ *Ibid.*, 1936, p. 1437; 32 A.J.I.L. Supp. 113 (1938).

²⁴ Final Act of the United Nations Conference on Freedom of Information, Docs. E/Conf. 6/79, E/727 and E/727/Add. 1; Whitton, "The United Nations Conference on Freedom of Information and the Movement against International Propaganda," 43 A.J.I.L. 73-87 (1949).

²⁵ Whitton, *loc. cit.* 81 ff., and Hague Recueil, note 7 above, p. 631.

²⁶ *Idem*, "An International Right of Reply?" 44 A.J.I.L. 141 (1950); U.N. General Assembly, 3rd Sess., Official Records, Pt. II (April 5-May 18, 1949), p. 21 ff.

²⁷ U.N. General Assembly, 2nd Sess., Official Records, Resolutions (Doc. A/519, 1948), p. 14; U.N. Yearbook 1947-1948, pp. 91-93. Resolution 110 (II), Measures to be Taken Against Propaganda and the Inciters of a New War.

Peace," in which, in particular, incitement to conflicts or acts of aggression was decried.²⁸

The Organization of American States, through almost continuous activity in this field, has demonstrated its intense preoccupation with the problem of international propaganda.²⁹ Thus, as early as 1935, at the 7th Pan American Conference, the matter was discussed and certain general recommendations adopted,³⁰ but at Buenos Aires, in 1935, more positive action was taken; there the South American Regional Agreement on Radio Communications was signed. The co-contractants pledged themselves to control the sources and accuracy of information broadcast, avoid defamatory transmissions, and abstain from favoritism to political and social parties operating in other adhering states.³¹ In 1936, at the Inter-American Conference for the Maintenance of Peace, held at Buenos Aires, three major resolutions concerned with broadcasting and peace were adopted. Adherence to the 1936 Geneva radio treaty was recommended, and signatories were warned to avoid broadcasting likely to disturb peaceful relations or wound the national susceptibilities of foreign listeners. The positive use of radio for the betterment of international relations was strongly recommended there,³² as well as at Rio de Janeiro in 1937,³³ and at Lima in 1938.³⁴

Since the war, these efforts have been resumed. Article 15 of the Charter of the Organization of American States, adopted at Bogotá in 1948, directed against intervention, is broad enough to include some types of propaganda.³⁵ Also at Bogotá, the American Republics voted to adopt measures against activities instigated abroad and designed to overthrow their institutions by violence, to foment domestic disorder or

to disturb, by means of pressure, subversive propaganda, threats or by any other means, the free and sovereign right of their peoples to govern themselves in accordance with their democratic aspirations.³⁶

In 1949, a dispute arose between the Republic of Santo Domingo and Haiti, the latter claiming to be a victim of "moral aggression," as one of its former colonels, taking refuge in Santo Domingo, had made "extremely vulgar and provocative broadcasts" aimed at the overthrow of the Haitian Government.³⁷ After the matter had been submitted to the Council of

²⁸ U.N. General Assembly, 6th Sess., Official Records, Supp. No. 1 (Doc. A/1844, 1951), p. 65; U.N. Yearbook, 1950, pp. 203-204.

²⁹ Whitton, note 7 above, p. 624 ff.

³⁰ U. S. Department of State, Conference Series, No. 19 (1934), p. 279 ff.

³¹ 7 Hudson, International Legislation, No. 407 (Washington, 1931).

³² U. S. Department of State, Conference Series, No. 33 (1937); LeRoy, "Treaty Regulation of International Radio and Short Wave Broadcasting," 32 A.J.I.L. 719, 729 ff. (1938).

³³ LeRoy, *loc. cit.* 730 ff.

³⁴ Pan American Union, Congress and Conference Series, No. 27.

³⁵ 1 Annals of the Organization of American States 77 (1949); 46 A.J.I.L. Supp. 46 (1952).

³⁶ Annals, *op. cit.* 134.

³⁷ *Ibid.* 217-219.

Consultation of the Organization of American States, the two states settled the matter *à l'aimable*, agreeing not to

tolerate in their respective territories the activities of any individuals, groups, or parties, national or foreign, that have as their object the disturbance of the domestic peace of either of the two neighboring Republics or of any other friendly Nation.³⁸

In April, 1950, the OAS Council called upon the governments of Haiti and the Dominican Republic to avoid all systematic and hostile propaganda against one another or against any American country.³⁹

As a result of this incident, the Department of International Law was directed by the OAS Council to draft a protocol for discussion at the Caracas Conference, later eliminated, calling on the signatories to agree to prevent the use of radio disseminating systematic and hostile propaganda against the government of any one of them, with the object of provoking rebellion or encouraging its overthrow by violence.⁴⁰

We should also mention the Second Meeting of the Inter-American Council of Jurists, held in 1953 at Buenos Aires, where in Resolution XVII, "Draft Convention on the Regimes of Political Exiles, Asylees and Refugees," we find in Article 6 the following:

Freedom of expression of thought and of speech, granted by domestic law to all inhabitants of a State, may not be ground for complaint by a third State on the pretext of opinions expressed publicly against it or its government by political exiles, asylees, or refugees, *except when they constitute propaganda tending to incite to the use of force or violence against the complaining State.*⁴¹ [Italics supplied.]

The vast body of law just reviewed—both international, including treaty law, and municipal law—and the thirty years of continuous effort by public and private international organizations, which we have adumbrated, is certainly impressive. But all this activity did little if anything to quell the violent propaganda battles of the inter-war period, nor is its influence

³⁸ *Ibid.* 326.

³⁹ 3 *ibid.* 23 (1951).

⁴⁰ Art. VII, referring to radio propaganda, and which was proposed as part of the revised Convention on Duties and Rights of States in the Event of Civil Strife, read as follows: "Article VII. The Contracting States agree to collaborate, within the limits of their respective constitutional powers, in preventing the use of the radio to carry on systematic and hostile propaganda, the object of which is to incite to the use of force or violence against the government of any Contracting State." 5 *Annals of the Organization of American States* 305 (1953)." The United States opposed Art. VII, arguing that it was "fraught with grave dangers to freedom of speech, sacred to this Hemisphere and to democratic countries everywhere." Fenwick, "Proposed Control over the Radio as an Inter-American Duty in Cases of Civil Strife," 48 *A.J.I.L.* 289-292 (1954). Due to the attitude of the United States and other governments, Art. VII was eliminated from the final draft. Protocol to the Convention on Duties and Rights of States in the Event of Civil Strife, opened for signature May 1, 1957 (Pan American Union, Treaty Series No. 7, Washington, D. C., 1957). This view reflects the typical hesitation found in many free countries to accept obligatory norms which, while designed to curb abuses, necessarily carry with them certain limitations on freedom of speech and expression.

⁴¹ 5 *Annals of the Organization of American States* 166 (1953).

very apparent today. Learned writers come and go, with their norms, *lex lata* and *lex ferenda*, but the propaganda seems to go on forever. The Hertzian signals among rival Arab states have been virulent in tone, some, it is claimed, even suggesting the assassination of rival leaders.⁴² The Voice of America and Radio Free Europe are considered so dangerous by Soviet Russia that the latter is actually spending more for jamming our programs than the American Government devotes to its entire budget for communications.⁴³ But the effort for control will and must continue. The international lawyer particularly, however discouraging the task, must persist in his attempt to define propaganda and to restrict its use by appropriate legal norms. And the expert on international organization, for his part, must try to discover appropriate procedures of collective supervision and control, and attempt to induce states, in the common interest, to accept them.

That there is still an opportunity for innovation in this field is the striking conclusion one may draw from President Eisenhower's recent proposal. True, the monitoring of broadcasts is not new. It was an invention of the inter-war period, widely used by dictatorships between the two wars and then adopted by all the belligerents on a broad scale in World War II. Today the monitoring of foreign broadcasts is an accepted adjunct of the intelligence services of all leading Powers. But monitoring by a great world organization is new. It would appear to have great potentialities, and deserves the most careful consideration. Investigation and publicity, leading to deliberation and recommendation, constitute today our most reliable procedures for peaceful settlement, even in the world of the "cold war." These procedures proved their worth once more during recent crises, notably on the occasion of the war scares over Suez and in Jordan and Lebanon. Charges and counter-charges of the misuse of radio and other types of propaganda, especially the subversive and war-mongering types, could be reported by an official agency of the United Nations, located preferably at Geneva. As a result the participants could be called on to explain the source and nature of the offensive communications before a meeting of a committee of the United Nations, or perhaps even before the United Nations General Assembly itself. This could lead to the kind of "quiet diplomacy" for which the present Secretary General is so justly renowned. The consequence might be to provide additional substantiation for the conclusion by Martin in his recent book, that "(T)he control of propaganda will remain in the municipal laws of states and the bargaining power of diplomacy."⁴⁴

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⁴² New York Times, Aug. 15, 1958.

⁴³ U. S. News and World Report, Aug. 29, 1958, p. 47; New York Times, Aug. 14, 1958.

⁴⁴ *Op. cit.* 207.

NOTES AND COMMENTS

POLAR PROBLEMS AND INTERNATIONAL LAW

The approval of the Alaskan statehood bill by the 1958 session of the United States Congress focuses new attention on the increasing penetration of the high northern latitudes. But Canada, Denmark, Iceland, Norway, Sweden, Finland and the Soviet Union, as well as the United States, have long been active in this frontier region. Increased human activity in the area, particularly when great Powers are involved, naturally results in international problems. The legal considerations are several. Equally serious developments in the region of the South Pole are of concern to international law.

I. DEVELOPMENTS IN THE ARCTIC

Although projects associated with the International Geophysical Year have been of major importance for the past two years,¹ the overriding tone of Arctic activity is one of *defense*. The severe conditions, especially the dramatic and erratic changes in temperature "affect human efficiency and create fantastically complex engineering and maintenance problems."² Yet in these forbidding climes nations are spending millions of dollars and making a permanent encroachment on a once desolate portion of the earth. The Alaska Command, activated January 1, 1947, under an Air Force general, became the first unified command of the American military. There the Army conducts its Arctic School, which has trained hundreds for service under the harsh circumstances of the region. The Navy's Arctic Research Laboratory is located on Point Barrow, northernmost U. S. territory, 1,120 nautical miles from the North Pole.³

In addition, trans-Arctic commercial aviation is now a proven success and promises considerable further expansion. In 1951 the Danish Foreign Office requested State and Defense Department permission to survey routes between Copenhagen and Los Angeles; exploratory flights were made in 1952 and 1953. The following year test flights were made between the Scandinavian capitals and Tokyo. The route to Los Angeles was activated in November, 1954, and the Tokyo service in February, 1957. Two U. S. carriers, Pan American World Airways and Trans World Airlines are now also engaged in this enterprise, flying from the

¹ The broadly conceived IGY (July 1, 1957, to Dec. 31, 1958) is the direct successor to the earlier Polar Years, 1882-1883 and 1932-1933. A third such period was called off because of the second World War.

² Department of Defense, *The Arctic, a Hot Spot of Free World Defense* (Washington: DOD Pam. 1-12, Office of Armed Forces Information and Education, Feb. 21, 1958), p. 3.

³ See L. O. Quam, "The Arctic Research Program of the Office of Naval Research," *Annals of the Association of American Geographers*, June, 1956, pp. 269-270 (abstract).

West Coast to London and Paris, although the American companies, which stop at Frobisher Bay, Baffin Island, do not actually reach the Arctic Circle.⁴ Air France began service from Paris to Japan in June, 1958; the Dutch KLM has approval for a schedule to Tokyo. Communications reliability and flying conditions generally have been found to be substantially more favorable along the Arctic routes than along the standard runs across the North Atlantic.⁵ Japanese, Korean and Philippine airlines reportedly are seeking a route via Tokyo and Alaska to New York. No United States carrier has thus far made any formal steps in this direction.

Of course, anyone today not conversant with "the Polar concept" is out of touch with long-range aerial navigation and political geography, not to mention modern weapons systems. Greenland and Alaska are both beneath the major strategic air routes from the centers of Soviet power to the U.S.A. At one point Siberia is only 56 miles from Alaska; in less than twenty seconds a plane of either side can transit the five-mile patch of water between Little Diomed Island (U. S.) and Big Diomed Island (U.S.S.R.). Because of the nature of the Russian terrain and long-standing appreciation of the ultimate significance of the Arctic, the high-latitude flying experience of Soviet airmen is unsurpassed.

Since strategists estimate that an attack on the United States by the Soviet Union would most likely be launched across the Arctic, North Polar defense measures, including a score of related support functions of a logistical, scientific and communications nature, have been given high priority by the Joint Chiefs of Staff out of sheer military necessity. In a sense "The Arctic is to us what the Mediterranean was to the Greeks and Romans, the center of the world."⁶

⁴ 66° 33' North Lat. Determination of what is "Arctic" properly so called and what lies outside this region cannot be made by arbitrary reference to the Arctic Circle, which indicates only the point north of which the sun is not seen at all during the winter and is seen continuously in summer. Delimitation into three zones is widely accepted: (a) the "sub-Arctic," defined as the world-encircling belt in which the mean temperature rises above 50° F. at least one but not over four months annually; (b) the true "Arctic," defined as everything north of the sub-Arctic or, more precisely, north of any point where the annual mean temperature is less than 50° F. for the warmest month; (c) the "polar segment," a colder portion of the true Arctic where the mean temperature of even the warmest month is less than freezing or 32° F. Since trees generally fail to subsist unless there is at least one month when the thermometer reaches into the fifties, a common rule of thumb has been that the Arctic *per se* begins at the tree line.

⁵ U. S. House of Representatives, Committee on Interstate and Foreign Commerce, International Geophysical Year. The Arctic. Antarctica. Report . . . , H. Rep. No. 1348, 85th Cong., 2d Sess., Washington, Feb. 17, 1958, pp. 35-38. The Lacy-Zaroubin Cultural Exchange Agreement of Jan. 27, 1958, recorded (Sec. XIV) agreement in principle on direct flights between the Soviet Union and the United States on the basis of reciprocity; specific terms were made a matter for later negotiation. Reciprocal aerial observation of Arctic ice in connection with the IGY was proposed to the U.S.S.R. without success by the United States in the fall of 1956. 35 Dept. of State Bulletin 508-509 (1956); *ibid.* 953.

⁶ Col. Bernt Balchen (U. S. Air Force, Ret.) as quoted in Dept. of Defense Pam. 1-12, *loc. cit.*

In conjunction with NATO allies, Iceland, Denmark and Canada, the United States has erected a complex defense posture across the entire North American Continent and key adjacent islands. In the vicinity of the Canadian-American border, a radar "picket fence" of last resort operates to detect the approach of unidentified aircraft. This is part of the "Pinetree System." Another electronic sentinel system has been built by Canada roughly along the fifty-fifth Parallel, known as the "Mid-Canada Line." Intelligence indications of Communist capabilities and intentions led to the establishment of the well-known "DEW Line" (Distant Early Warning) at 70 degrees North Latitude, well within the Arctic Circle. All of these warning posts are linked instantaneously to NORAD (North American Air Defense Command) Headquarters in Colorado Springs.⁷

The military bases and facilities to supply, to protect and, most important, to act immediately on detections of these systems are strategically situated, frequently not on U. S. territory. The most valuable installation is the huge Thule Air Force Base, 910 miles from the Pole in Denmark's Greenland.⁸ Other bases in Newfoundland, Labrador and Iceland are essential to the defense of America. Joint staffing, operation and tests are necessary and desirable, especially where the ever-present "enemy" is nature herself. Of special interest is the U. S. Air Force research station on "T-3," an ice island twice as large as Bermuda, first spotted on radar in 1946 and which once drifted to within 100 miles of the North Pole. The Russians have, however, been the most active in studies of the Arctic Ocean and its ice. Soviet aircraft have made dozens of landings on various portions of the pack ice, beginning in 1937. Russian Arctic weather stations, including five stations on the ice, transmit meteorological data to the West.⁹

The *Nautilus*, first atomic submarine, after an exploratory under-ice voyage to Latitude 87 in 1957, passed directly "under" the North Pole on August 3, 1958, during an over-the-Arctic cruise between the Hawaiian Islands and the British Isles. Several days later the *Skate* also crossed the Pole, part of an elaborate investigation of a promising new frontier. Disregarding the specific scientific data and navigational experience gained, the ramifications for the future of the Arctic as an artery of commerce as well as a route of hostilities are extraordinary. Cargo submarines would reduce the length of the shipping lane between, for example, Tokyo and London to 7,500 miles from the present 13,800. Submarine tankers could deliver Alaskan and Canadian oil directly to the European market. Other achievements are in the offing which will affect exploitation of both the Arctic and the Antarctic. Completion of the development by Army

⁷ For the latest U. S.-Canadian agreement on NORAD, see 38 Dept. of State Bulletin 979-980 (1958).

⁸ Thule was arranged for under the "common defense" terms of the Copenhagen agreement of April 27, 1951, between Denmark and the U. S.

⁹ U. S. House of Representatives, Committee on Interstate and Foreign Commerce, *op. cit.*, p. 38.

Engineers of a portable nuclear power plant will revolutionize Polar exploration, settlement and scientific observation as well as military tactics.^{9a} New-type, heavy-duty icebreakers and regular transports with reinforced hulls and special prows are being constructed. The bridge between the New World and the Old is indeed shifting toward the Arctic Ocean—the new Mediterranean.

The U. S. Navy is now planning for the possibility of inter-fleet and fleet-to-mainland, nuclear-missile warfare in Arctic waters. The Arctic Research Advisory Committee, a panel of U. S. and Canadian experts headed by Dr. Walter A. Wood of the Arctic Institute of North America, has urged expanded research and development in the region and extension of the joint defense frontier “to the northern rim of the Soviet land mass.”¹⁰ At Thule, Greenland, and in the Aleutian Islands, giant-sized early-warning radar is under construction to detect ballistic missiles 3,500 miles or more away. However, Polar deployment of missile striking forces converts present intermediate-range ballistic missiles into actual intercontinental missiles because of the reduced distance. The time between launching from an Arctic base to arrival on target, say in the United States, is less than thirty minutes. Nuclear submarines passing under the ice from either side may approach to within several hundred miles of vital targets while still submerged in sub-Arctic waters (for example, Hudson’s Bay) and discharge Polaris-type missiles with devastating effect. The great importance of Arctic communications and transport to the Russian empire—as well as to the Soviet offensive submarine and aerial capability—make surveillance of the extensive Arctic coastline of Russia of unusual value to Western naval and air strategists. General H. H. Arnold, Commander of the American Air Corps in the second World War, recorded his opinion that the North Polar regions would be the strategic center of any third World War. His prediction no longer sounds foolish or even “futuristic.”

With this review of the rôle of the Arctic in current strategic thinking, recent events, particularly the discussions in the United Nations Security Council, find a proper and sober setting. On April 18, 1958, in a Moscow press conference, Soviet Foreign Minister Andrei A. Gromyko distributed a statement calling upon all nations to “raise their voices in protest” against the “provocative actions” of the United States Air Force. It was charged that Strategic Air Command bombers bearing nuclear weapons are launched across the Arctic toward Russian borders when “vague

^{9a} At the national reactor testing station in Idaho Falls, Idaho, a prototype of the desired “package” unit was pronounced a success on Aug. 13, 1958, by the Argonne National Laboratory (operated by the University of Chicago for the Atomic Energy Commission). The unit at full power is designed to produce 3,000 thermal kilowatts and require refueling only once every three years. The reactor is an air-cooled, direct-cycle, natural-circulation boiler type requiring little installation work and adaptable to any terrain. Even the largest component, measuring some 20 by 9 by 7 feet and weighing no more than ten tons, is transportable by air. The saving in diesel fuel oil alone will be an immense reduction in the logistical support of any remote base.

¹⁰ New York Times, Jan. 25, 1958.

shapes," interpreted as possible hostile missiles or aircraft, appear on radar scopes along the DEW Line. The protection of Soviet interests would require "immediate steps to remove the approaching danger," Gromyko said, should such flights actually come close to the Soviet Union. Commenting that this was "too dangerous a game to tolerate its continuance," the Foreign Minister demanded such flights be stopped immediately.¹¹ In New York the Soviet delegate to the United Nations, Arkady A. Sobolev, demanded a Security Council meeting to deal with this "threat to the cause of peace." In spite of a general acceptance of American explanations of interlocking safety measures which could be removed only by order of the President, the critical possibility of a chain reaction touched off by an erroneous alert flight, responded to in kind by the other side, gave rise to grave concern among many United Nations delegates. Should the entire process somehow fail to be checked, the consequences would be disastrous.

After Security Council debates on April 21, the Soviet delegate withdrew his government's proposed resolution¹² condemning United States action, when it became apparent that nine of the eleven votes would without question be against the Communist position.¹³

A week later the United States requested that the Security Council take up a specific proposal for the prompt establishment of an international inspection system in the Arctic, directly under the United Nations, to preclude surprise attack over that region.¹⁴ The text of the draft resolution read as follows:

The Security Council

Considering further the item of the U.S.S.R. of 18 April, 1958,

Noting the development, particularly in the Soviet Union and the United States of America of growing capabilities of massive surprise attack,

¹¹ U.N. Doc. S/3991, April 18, 1958. For the text of the statement and the U. S. reply see New York Times, April 19, 1958, pp. 1-4; 38 Dept. of State Bulletin 728-729 (1958). United Press dispatches were cited by the Soviets as the source of information about such "armed" flights. The April dispatch by Frank H. Bartholomew, President of United Press, which described in some detail the SAC procedures and state of readiness, is printed in the New York Times, April 19, 1958.

¹² U.N. Doc. S/3993, April 21, 1958. For the U. S. statement by Ambassador Henry Cabot Lodge, see 38 Dept. of State Bulletin 760-763 (1958).

¹³ Japan (by previous announcement) and the U. K., France, Canada, China, Colombia, Iraq, Panama and the U. S. (from orientation of remarks during debate). Sweden, the tenth member, made no comment in the discussion.

¹⁴ When the general "open skies" plan advanced by President Eisenhower at the July, 1955, Geneva Summit Meeting failed to win Soviet approval, the United States offered to restrict the scheme to a designated zone in the Arctic regions. This alternative plan, submitted at the 1957 London disarmament talks, while not rejected by Moscow, was at least outwardly belittled. At that time Arctic wastes inhabited only by polar bears were not deemed worthy of serious discussion. See 33 Dept. of State Bulletin 173 (1955) ("open skies"); *ibid.* 643; 36 *ibid.* 961 (1957) (Dulles' news conference of May 29, where announcement was made that the U. S. would be willing to start the "open skies" in a limited area such as the Arctic in order not to have "the whole process . . . get bogged down"); 38 *ibid.* 679 (1958) (text of April 8 restatement). See also Time, May 12, 1958, pp. 24-25, with map of proposed Arctic inspection zone.

Believing that the establishment of measures to allay fears of such massive surprise attack would help reduce tensions and would contribute to the increase of confidence among states,

Noting the statements of certain members of the Council regarding the particular significance of the Arctic area,

Recommends that there be promptly established the northern zone of international inspection against surprise attack, comprising the area north of the Arctic Circle with certain exceptions and additions, that was considered by the United Nations Disarmament Subcommittee of Canada, France, the U.S.S.R., the United Kingdom and the United States during August, 1957;

Calls upon the five states mentioned, together with Denmark and Norway, and any other states having territory north of the Arctic Circle which desire to have such territory included in the zone of international inspection, at once to designate representatives to participate in immediate discussions with a view to agreeing on the technical arrangements required;

Decides to keep this matter on its agenda for such further consideration as may be required.¹⁵

This diplomatic initiative was received very favorably in the non-Communist world, where immediately widespread speculation began on the possible details of such an "Arctic Patrol." It was contemplated that inspection, whether accomplished by planes or by radar vigilance from the surface, or both, would be conducted by mutually trusted neutrals.

Another in the series of notes between the American Chief Executive and the Chairman of the Council of Ministers of the Union of Soviet Socialist Republics was timed to reinforce Ambassador Lodge's speech opening debate in the Security Council on April 29.¹⁶ The Secretary General, Dag Hammarskjöld, regarded the opportunity so highly that he intervened to support the plan of the United States.¹⁷

The proposed "northern zone of international inspection against surprise attack" included

all the territory north of the Arctic Circle of the Soviet Union, Canada, the United States, Denmark and Norway; all the territory of Canada, the United States and the Soviet Union west of 140 degrees West Longitude, east of 160 degrees East Longitude and north of 50 degrees North Latitude; . . . all the remainder of the Kamchatka Peninsula; and all of the Aleutian and Kurile Islands.¹⁸

The bulk of any nuclear surprise attack would, in the opinion of the United States, pass over this zone. Arrangements were completed to broaden the new proposal to include the portions of Sweden, Finland and Iceland within the Arctic Circle. All countries—except the Soviet Union—

¹⁵ U.N. Doc. S/3995, April 28, 1958.

¹⁶ For the text of the letter from President Eisenhower to Khrushchev, dated April 28, see 38 Dept. of State Bulletin 811-812 (1958); Khrushchev's May 9 reply is *ibid.* 940-942. Lodge's address, along with other speeches and a Soviet counter-resolution are in U.N. Doc. S/P.V. 814, April 29, 1958, with map of the proposed inspection zone.

¹⁷ For this move the Secretary General was mildly rebuked by Mr. Sobolev but strongly attacked in the Soviet press.

¹⁸ U.N. Doc. DC/SC.1/66, Annex 5, p. 7 (as quoted by the U. S. representative in U.N. Doc. S/P.V.814, April 29, 1958, p. 21).

whose territories fell within the zone, indicated readiness to accept United Nations inspection. Lodge emphasized that the system

should be an agreed international system and not just a national system; any such system should include some means of advance notification of flights and any other movements of military significance in the Arctic Zone; there should be radar monitoring of all such flights and the concept of ground inspection posts, as suggested by the Soviet Union, should be included.¹⁹

The Soviet Union branded the entire proposal "a diversionary maneuver" and insisted that "tension in the Arctic region is entirely attributable to the acts of the United States in despatching planes carrying atomic and hydrogen bombs in the direction of the frontiers of the Soviet Union."²⁰ Soviet delegate Sobolev, at the time his charges against SAC were being debated, had refused to discuss inspection and warning proposals on the grounds that, in view of the deadlock in disarmament talks, the matter was appropriate only for a summit conference. Sweden moved to conciliate the two positions by adding a paragraph to the American resolution:

Expresses the view that such discussions might serve as a useful basis for the deliberations on the disarmament problem at the summit conference on the convening of which talks are in progress.²¹

After bitter debate the matter was brought to a vote, at which time the Soviet Union cast its eighty-third "veto." The other ten members of the Security Council voted favorably.²²

The failure to achieve limited internationalization of the Arctic is not likely to have any deterrent effect on the area's growing strategic significance. In order to avoid repeated friction—if not genuine tragedy—this hitherto remote region must be integrated into some settled political system.²³ As long as the Arctic remains an economic, legal and military wilderness—and a controversial one at that—there can be no easing of international tensions. Given the irresistible line of development of major weapons systems, only a positive neutralization of the Arctic attack routes can bring hope for general disarmament or even a relaxation of the cur-

¹⁹ U.N. Doc. S/P.V.814, p. 21.

²⁰ *Ibid.* 36. For the Lodge rebuttal to Sobolev's objections to the modified U. S. proposal, see 38 Dept. of State Bulletin 819-820 (1958).

²¹ U.N. Doc. S/3998, April 29, 1958. Italics in the original. Sweden agreed to a U. S. suggestion to change "the" to "a" before "summit conference." The final text of the draft resolution, the Swedish amendment having been accepted, appears in 38 Dept. of State Bulletin 820 (1958).

²² Subsequently a Soviet counter-proposal (U.N. Doc. S/3997, April 29, 1958) to refer not only the Polar question but also the questions of nuclear weapons tests, nuclear weapons prohibition and relinquishment of U. S. bases in Europe to the "summit" was rejected by a vote of 9 to 1, with Sweden abstaining.

²³ At the Annual Meeting of the American Society of International Law, April 25, 1958, Panel IV, "Legal Problems and the Political Situation in the Polar Areas," undertook to examine the peculiar circumstances, the traditional law and the possible alternatives for "normalization" of these regions. Representatives from international law, physical science, diplomacy and the military participated. The results will be found in the Society's Proceedings, 1958, at pp. 135 ff.

rently necessary, hard military posture on both sides. Talking "disarmament" is not only wishful thinking but dangerously naïve, if not accompanied by relatively foolproof military safeguards in the hands of trusted agents of the world community. To "sanitize" the portion of the globe through which calamitous surprise attack is most likely to pass, would be a sensible and practicable approach to the alleviation of the overriding fear of our time: full-scale nuclear war.

II. DEVELOPMENTS IN THE ANTARCTIC

On March 11, 1957, at the age of 68, Rear Admiral Richard E. Byrd died. His name was for many virtually synonymous with Polar exploration. An era died with him. In 1955 Admiral Byrd had been named top policy officer within the Defense Establishment on Antarctic matters. Rear Admiral George Dufek has succeeded him as Officer in Charge, United States Antarctic Projects, inheriting the Byrd staff and mantle and the job of advising the Operations Co-ordinating Board of the Executive Branch of the United States Government.

In the early post-World War II period Byrd himself helped terminate the era he personified, that is, the primacy of the private and semi-private professional explorer who penetrated a virgin and unearthly vastness of sea, ice, mountains and snow-desert with a patriotic but also a deeply personal, almost proprietary interest. Today expeditions are official, often military, projects with multiple objectives. The operations mounted by the United States in recent years are of unprecedented scale and scope.²⁴ In addition to scientific observations and basic exploration, tests of special equipment and supplies are made; valuable training is afforded officers, crews and troop units. Since the first flights to Antarctic airfields from terrain outside the region (in this case, Christchurch, New Zealand) were completed in 1956 by Navy planes and later by Air Force Globemasters, the "season" has been extended up to three months by making bases available long before ships can approach through the ice. Pan American World Airways sent the first commercial airliner—stewardesses and all—to McMurdo Sound, Antarctica, October 15, 1957.

The basic stimulus for the stepped-up activity in Antarctica since 1955 has been the preparations for and the conduct of the International Geophysical Year. Technically a co-operative, non-governmental effort on the part of the various national members of the International Council of Scientific Unions, the IGY has received much publicity and considerable official support. Nothing approaching the number and breadth of projects scheduled for completion by the end of 1958 had ever been attempted previously.²⁵ Twelve nations have co-operated in the Antarctic and sub-Antarctic ob-

²⁴ During the Antarctic seasons commencing in 1946 and in 1947, the U. S. held Operations Highjump and Windmill. The next major expedition was in 1955.

²⁵ An interesting by-product is New Zealand's increased earnings of over a million dollars annually from purchases of supplies by American expeditions and personal items by expedition members and staff.

servations and tests for the IGY.²⁶ Partly because the projects were scientist-designed and partly because there exists a "gentleman's agreement" that all activities *during* the eighteen-month IGY are to be regarded as non-political (that is, without merit in making territorial or other claims), the international co-operation has been outstanding among all participants, including the Russians.

In April, 1958, the Department of State announced it was conducting diplomatic conversations with the interested nations concerning an extension of the scientific co-operation beyond the International Geophysical Year. The International Council of Scientific Unions, after an exploratory meeting in Stockholm in September, 1957, created a Special Committee on Antarctic Research (SCAR) which met in The Hague in February, 1958, to discuss specifically post-IGY work.²⁷ It was first announced in January, 1958, that the United States would for certain continue its scientific operations in the Antarctic past the IGY's December 31 termination date.²⁸ Four of the seven U. S. stations were selected for continued observations.²⁹ The Navy will mount an Operation Deep Freeze IV in command of Admiral Dufek to support the post-IGY program. Thirty-four aircraft, nine ships, and 2,700 men have been assembled for the task. Details were to be

²⁶ Argentina, Australia, Belgium, Chile, France, Japan, Norway, New Zealand, the Soviet Union, the Union of South Africa, the United Kingdom and the United States. Scientific assignments and procedures for the IGY had been placed in the hands of a special committee (Comité Spécial de l'Année Géophysique Internationale, or CSAGI) in 1953 by the International Council of Scientific Unions. Four preparatory conferences were held in Paris and Brussels in 1955, 1956 and 1957 by the Committee's subdivision, an Adjoint Secretary for the Antarctic.

²⁷ As early as June, 1957, the U. S. delegate to the Antarctic meeting in Paris had urged continuation of the scientifically important and costly IGY stations. This position was maintained also at The Hague. The U. S., U.S.S.R., Belgium and Argentina favored extension; Australia, Chile, the Union of South Africa and the U. K. were, at that time, opposed. The remaining states had not reached a decision.

²⁸ The House Committee on Interstate and Foreign Commerce had so recommended in a letter to the President, dated Jan. 17, 1958. The Committee also recommended "a re-evaluation" of the traditional U. S. position on territorial claims, in view of the establishment of permanent stations and the potential development of Antarctic air routes. It was further recommended that a permanent supply station be constructed to supplant Ross Island's temporary facilities and that the Marble Point (McMurdo Sound) area be made into a major, permanent, snow-free airport looking toward future, regular commercial as well as scientific air service. A six-man Subcommittee on Transportation and Communication, headed by Rep. Oren Harris of Arkansas, had visited the U. S. installations in the Antarctic in November, 1957; members of the group were much impressed with the tourist potential as well as the strategic and scientific importance of the region.

²⁹ South Pole, Hallett, McMurdo Sound and Byrd Stations. Wilkes, Ellsworth and Little America were to be evacuated. The dropping of Little America, on shelf ice and formerly the main base, is consistent with the new efforts to place American operations on sounder physical footing; the McMurdo Sound station will become U. S. headquarters. Little America and McMurdo are both within the sector claimed by New Zealand, as is Hallett. Wilkes Station is in the Australian sector, but Byrd Station is in the region left open for an official U. S. claim. The South Pole station is situated at the apex of every sector claim and thus theoretically within them all, except that Norway's claim does not pretend to extend farther south than Norwegians have explored.

worked out by the Office of United States Antarctic Projects and the National Science Foundation in conjunction with an increasing number of Federal departments and agencies with interests in the region or in the results of the operations. The Soviet Union, operating several stations,³⁰ has likewise expressed its intention to remain.³¹ Australia and the United States jointly announced agreement to co-operate in the maintenance of the Wilkes Station, although that was one of the stations originally scheduled for abandonment.³² And plans are reasonably firm to turn over the Weddell Sea base, Ellsworth Station, to the Argentines.

On February 11, 1958, British Prime Minister Harold Macmillan announced, during a visit to Australia, a shift in his government's traditional position of individual sector claims, and called for internationalization and demilitarization of the Antarctic. National claims were to be ruled out and scientific research promoted. This plan brought a flurry of mixed reactions. The most outspoken statement was made by Señor Alberto Sepúlveda Contreras, Chilean Minister of Foreign Affairs:

1. There is an American Antarctica, which is an integral part of the Western Hemisphere.

In keeping with the provisos of the Mutual Assistance Treaty signed at Rio de Janeiro in 1947, . . . the Sector of Antarctica between the 24th and 90th meridians of West Longitude . . . is a part of the "American Security Zone."

American Antarctica is included in the Interamerican Defensive System and the maintenance of its security is the direct responsibility . . . should there be an extra-continental attack or aggression, of the Community of the Nations which belong to this System.

2. The Antarctic Territory of Chile is a part of this "American Security Zone." . . . Our country holds the oldest rights of sovereignty on this Territory, as established in the first place by repeated Provisos and Mandates from Spain and then, later, throughout our life as a Republic, by successive acts of our Government and the uninterrupted exercise of such sovereignty.

³⁰ In addition to the coastal supply and headquarters base at Mirny on the Queen Mary Coast, the Soviets man Pionerskaya, Vostok I, Komsomolskaya (at the Geomagnetic Pole) and Sovietskaya, the latter being the base set up by the party attempting—so far without success—to reach the 14,000-foot high, so-called "pole of inaccessibility," the point on the Antarctic Continent most remote from the sea. All Russian activity is within the sector claimed by Australia.

³¹ Mikhail Somov, Director of the Soviet Antarctic Expedition, reportedly favors "some sort of permanent international scientific station in the Antarctic." *New York Times*, Feb. 21, 1958. During the August, 1958, meeting of SCAR in Moscow, the U.S.S.R. announced its intention to discontinue the intermediary station, Pionerskaya, but to add two more bases, one on Queen Maud Land (an area claimed by Norway) and another on the hitherto unattainable coast of Bellingshausen Sea (this could be placed either in the Chilean sector or in the so far unclaimed area). A tractor expedition from the Russian Vostok station to the South Pole and thence to the "pole of inaccessibility" (c. 14,000 feet altitude) is also planned.

³² The U. S. provides existing facilities and supplies; Australia will take over future administration and logistical support. Personnel from both countries will man the station's scientific program. These arrangements are to "have no effect on the rights or claims asserted by either country in Antarctica." 38 Dept. of State Bulletin 912 (1958) (Press Release No. 245, May 6, 1958).

3. For the reasons indicated, the Government of Chile could only reject any proposal which might imply the internationalization of, or condominium over, any part of its National Territory, whether it be in Antarctica, in America, or in its insular possessions in the South Pacific.

Once any such proposal is out of the way, the Government of Chile is prepared to look with interest into the possibility of a closer agreement designed to guarantee the continuation of the scientific collaboration which has made it possible to implement the Antarctic aspect of the International Geophysical Year Program with such notorious success. . . .

4. In brief . . . the interest, both of Chile, as such, and of the other friendly nations, would make it meet that an agreement be signed, and that it comply with the basic objectives formulated [by the British] to the effect that there be no armed demonstration whatsoever in order to avoid political rivalries and to make this collaboration equitably possible. This is an idea which our country has been favoring for many years. . . .³³

The Latin Americans have not forgotten that President Franklin D. Roosevelt, in facing the Axis challenge, decided to extend the Monroe Doctrine to that portion of the Antarctic under South America and requested the Department of State to consider the advisability of a joint claim there "in behalf of and in trust for, the American Republics as a whole." Secretary of State Cordell Hull announced flatly in 1940 that continental defense considerations made it imperative that the American Republics sustain dominant title to that quadrant.³⁴

During the winter and early spring of 1958 the United States Government was gathering itself for a concerted move into the field of Antarctic policy. The approaching close of the IGY as well as the presence of the Russians in the area made it obvious to a number of the interested states that further delay would be reckless indeed. Internal co-ordinations and external conversations culminated in this initiative on May 3 by the President:

The United States is dedicated to the principle that the vast uninhabited wastes of Antarctica shall be used only for peaceful purposes. We do not want Antarctica to become an object of political conflict. Accordingly, the United States has invited eleven other countries, including the Soviet Union, to confer with us to seek an effective joint means of achieving this objective.

We propose that Antarctica shall be open to all nations to conduct scientific or other peaceful activities there. We also propose that

³³ Chile, Ministry of Foreign Affairs, Administrative Bureau, Foreign Information and Cultural Relations Branch, Circular No. 21, Santiago, Feb. 18, 1958.

³⁴ Laurence M. Gould, *Antarctica in World Affairs* (Foreign Policy Association Headline Series No. 128, New York: March-April, 1958), p. 29. The best published account of this period is in *The Memoirs of Cordell Hull*, Vol. 1, pp. 758-759 (New York: The Macmillan Co., 1948). During the war, German raiders actually captured part of the Norwegian whaling fleet in sub-Antarctic waters; there is no evidence of Japanese or Italian operations. Apprehension over pro-Nazi elements in Argentina led to the establishment of British bases in the Palmer Peninsula area to help protect the critical Drake Strait.

joint administrative arrangements be worked out to ensure the successful accomplishment of these and other peaceful purposes.

The countries which have been invited to confer are those which have engaged in scientific activities in Antarctica over the past nine months in connection with the International Geophysical Year. I know of no instance in which international co-operation has been more successfully demonstrated. However, the International Geophysical Year terminates on December 31, 1958. Our proposal is directed at insuring that this same kind of cooperation for the benefit of all mankind shall be perpetuated after that date.

I am confident that our proposal will win the wholehearted support of the people of all the nations directly concerned, and indeed of all other peoples of the world.³⁵

The diplomatic note delivered by the respective U. S. ambassadors to the foreign ministers of Argentina, Australia, Belgium, Chile, France, Japan, New Zealand, Norway, the Union of South Africa, the Union of Soviet Socialist Republics and the United Kingdom read in part:

. . . The need for coordinated scientific research in Antarctica . . . will continue for many more years into the future. Accordingly, it would appear desirable . . . to reach agreement . . . on a program to assure the continuation of the fruitful scientific cooperation . . . Such an arrangement could have the *additional advantage of preventing unnecessary and undesirable political rivalries in that continent, the uneconomic expenditure of funds to defend individual national interests, and the recurrent possibility of international misunderstanding*. It would appear that if harmonious agreement can be reached among the countries directly concerned in regard to friendly cooperation in Antarctica, there would be advantages not only to those countries but to all other countries as well.

The present situation in Antarctica is characterized by *diverse legal, political, and administrative concepts* which render friendly cooperation difficult in the absence of an understanding among the countries involved. Seven countries have asserted claims of sovereignty to portions of Antarctica, some of which overlap and give rise to occasional frictions. Other countries have a *direct interest* in that continent based on *past discovery and exploration, geographic proximity, sea and air transportation routes*, and other considerations.

The United States for many years has had, and at the present time continues to have, *direct and substantial rights and interests* in Antarctica. Throughout a period of many years, *commencing in the early eighteen-hundreds, many areas of the Antarctic region have been discovered, sighted, explored and claimed on behalf of the United States by nationals of the United States and by expeditions carrying the flag of the United States*. During this period, the Government of the United States and its nationals have engaged in well-known and extensive activities in Antarctica.

In view of the activities of the United States and its nationals referred to above, my Government reserves all of the rights of the United States with respect to the Antarctic region, *including the right to assert a territorial claim or claims*.

It is the opinion of my Government, however, that the interests of

³⁵ 38 Dept. of State Bulletin 910-911 (1958) (White House Press Release, May 3, 1958).

mankind would best be served, in consonance with the high ideals of the Charter of the United Nations, if the countries which have a direct interest in Antarctica were to join together in the *conclusion of a treaty* which would have the following peaceful purposes:

- A. *Freedom of scientific investigation throughout* Antarctica by citizens, organizations, and governments of all countries; and *a continuation of the international scientific cooperation* which is being carried out so successfully during the current International Geophysical Year.
- B. International agreement to ensure that Antarctica be used for peaceful purposes only.
- C. Any other peaceful purposes not inconsistent with the Charter of the United Nations.

. . . It is believed that such a treaty can be concluded *without requiring any participating nation to renounce whatever basic historic rights it may have in Antarctica, or whatever claims of sovereignty it may have asserted.* It could be specifically provided that such basic rights and such claims would remain *unaffected while the treaty is in force*, and that *no new rights would be acquired and no new claims made by any country during the duration of the treaty.* In other words, the *legal status quo* in Antarctica would be frozen for the duration of the treaty, permitting cooperation in scientific and administrative matters to be carried out in a constructive manner without being hampered or affected in any way by political considerations. Provision could likewise be made for such *joint administrative arrangements* as might be necessary and desirable to ensure the successful accomplishment of the agreed objectives. . . . *the cooperation of the specialized technical agencies of the United Nations would be sought.* . . .

. . . the Government of the United States has the honor to invite the Government of _____ to participate in a Conference for this purpose to be convened at an early date at such place as may be mutually agreeable. . . .³⁶

One month later the State Department announced that all eleven nations had accepted the President's invitation. Several of the notes of acceptance, including that of the Soviet Union, made general reservations regarding territorial claims and other rights, but these seemed in complete harmony with the "*status quo*" concept of the American proposal. Consultations began almost immediately in Washington on the matters of time and place for the conference and of specific draft treaty language to achieve the goals of the meeting. Simultaneously every country began a systematic study of and search into its own position, titles and historical activity in Antarctic lands and waters.³⁷

Faced with a widely popular, concrete proposal, and the likelihood that the conference would be held in any event, Chile and Argentina agreed to participate. The possibilities have been the subject of repeated contempla-

³⁶ *Ibid.* 911-912; emphasis supplied.

³⁷ As an aid to general study and analysis of the question, the United States Antarctic Projects Officer arranged for the publication of this writer's annotated bibliography of 1,117 entries by the Government Printing Office under the title: *National Interests in Antarctica* (in press).

tion in the Latin American press.³⁸ Several other South American states have begun to take an interest. It is reported that at the request of *Itamaraty* (the Brazilian Foreign Office) local military circles, including the Superior War College, have begun to study the possibility of Brazilian participation in an Antarctic settlement and even of an Antarctic claim. Peru and Uruguay have also recently begun studies along similar lines, the latter having appointed a Commission to Study the Rights of Uruguay in the Antarctic. A logical extension of the sector principle to all of the littoral states of southern South America appears to be the basic "approach" and hope of these countries. This scheme has been named "the theory of projections" by its proponents.³⁹ Simply by dropping a line down the "unobstructed" meridians southward to the Pole, the following divisions of territory in Antarctica are obtained (all Longitude West):

- a. To Brazil: 34° 40' to 53° 20';
- b. To Uruguay: 53° 20' to 56° 40';
- c. To Argentina: 56° 40' to 66° 30';
- d. To Chile: 66° 30' to 75° 40';
- e. To Peru: 75° 40' to 81° 20'.

While these countries may have contrived their entrance into Antarctic affairs too late for actual participation in the impending conference of interested states, any discussions or later programs by United Nations organs or by any of the specialized organizations will provide an opportunity for the assertion of Peruvian, Uruguayan and Brazilian "rights."

The presence of competing state activity has caused the older claimants and interested states to redouble their efforts.⁴⁰ In a new spirit of compromise it is now considered urgent to put into operation agreements which

³⁸ See in particular the article by Julio Escudero G., "La Próxima conferencia internacional antártica," *El Mercurio* (Santiago, Chile), May 31, 1958, in which some of the principles are said to be easy of attainment, but others, it is feared, will lead "to long and perhaps impassioned discussion."

³⁹ The most ambitious public exposition of this theory to date appears in the series of three articles: "Teorías de reivindicaciones y derechos sobre territorios antárticos. Tema apasionante. Desde el derecho de conquista a la fórmula de Eisenhower pasando por la internacionalización y la teoría de las proyecciones. Posición uruguaya ante sus posibles derechos," *El Día* (Montevideo) May 13 (p. 9), 14 (p. 9) and 15 (p. 10), 1958, maps (including two showing the operation of the "theory of projections"). Uruguayan military and diplomatic leaders are quoted extensively in this connection.

⁴⁰ For example, the Instituto Antártico Argentino has been reorganized and now issues a twice-yearly *Boletín*, beginning with Vol. 1, No. 1 in May, 1957 (No. 2, Nov., 1957). Chilean Foreign Minister Sepúlveda has taken over personal direction of his country's Antarctic Commission; the Minister of National Defense serves as alternate president and the chairmen of the foreign affairs committees of the Chilean Senate and Chamber of Deputies are now regular members. To organize and sustain the program of the New Zealand Government, an "Antarctic Executive Officer" has been appointed to the staff of the Chairman of the Ross Dependency Research Committee. The committee chairman is also Director of the Geophysics Division in the Department of Scientific and Industrial Research.

will preclude uncontrolled expansion of the Communist contingents and the introduction of military and other "Cold War" considerations.

On July 15, 1958, Ambassador Arthur S. Lall of India requested that "the question of Antarctica" be placed on the agenda of the Thirteenth General Assembly. An Explanatory Memorandum attached to his letter said in part:

. . . [Antarctic] mineral wealth . . . is believed to be considerable and its coastal waters contain important food resources. With the development of rapid communications, the area is coming to have practical significance to the welfare and progress of all nations. . . .

In view of the growing interest in and knowledge about the area, and in view of the fact that many countries including India are particularly interested in the meteorological aspects and implications of all that happens in Antarctica, it would be appropriate and timely now for all nations to agree and affirm that the area will be utilized entirely for peaceful purposes and for the welfare of the whole world. . . .

. . . The Government of India believe that this limited purpose can be achieved without any nation renouncing such rights as it may claim in Antarctica, or claims of sovereignty or other rights consistent with the Charter. The Government of India are of the view that the action proposed can only be taken by the world community as a whole, and they accordingly suggest that consideration be given to the question. . . .⁴¹

India proposed this same agenda item in 1956. Opposition to general discussion, particularly by Chile and Argentina, caused India finally to withdraw her proposal at that time. Similar and even broader resistance to a General Assembly debate (now that a twelve-nation conference of interested states may be called), plus the number of other pressing world problems, has caused India to decide once again not to press the issue for the time being.

Meanwhile findings continue to come in from the some 715 men who make up the current Antarctic wintering parties.⁴² A Russian station reported a new world's record low temperature, minus 125 degrees Fahrenheit. There has been persistent speculation that Antarctica was one vast archipelago and only apparently a continent because of the huge overlaying ice blanket. This theory was once again discounted by the findings of the Commonwealth Trans-Antarctic Expedition during an overland trek of 2,125 miles from Shackleton Station on the Weddell Sea to Scott Station on the Ross Sea.⁴³ Soundings showed the land underneath

⁴¹ U.N. Doc. A/3852, July 15, 1958.

⁴² The contingents from New Zealand, Australia, Norway, the United Kingdom, Belgium, Japan, Argentina and Chile total roughly 200; the Soviet Union has 175 and the United States, approximately 340. Although larger "population" totals can be had for the summer months, this is a new record for year-round habitation. The Russians employ women, but in summer parties only.

⁴³ Headed by Dr. Vivian Fuchs. Only two others, Norway's Roald Amundsen and Britain's Capt. Robert Falcon Scott had previously reached the South Pole by overland means (on Dec. 14, 1911, and Jan. 18, 1912, respectively); Scott's party perished in

the ice cap *along the route* to be consistently above sea level. But American parties found much of Marie Byrd Land to be up to 5,000 feet *below* sea level, with the ice cover averaging 5,000 feet above sea level. There is some precedent in the Arctic for thinking that the heavy weight of 10,000 feet of Antarctic ice has, over the ages, depressed the land mass to its present level below the sea.⁴⁴ On the other hand, portions of Antarctica may prove to be mountain-top islands in a frozen sea and the possibility of a below-sea-level trough from the Ross Sea to the Weddell Sea via Marie Byrd Land is not yet out of the question.

In any event the complications for international law are numerous when it must be conceded that thousands of square miles of interior Antarctic surface are in reality 10,000 feet of rigid ice over rock that is way below sea level. If this ice were melted, much of the area would clearly be "high seas." Such a holding under present conditions is patently absurd. It is not yet known whether the ice in these below-sea-level regions is frozen fresh or frozen sea water.⁴⁵ Even if a basic continent with its major portions above sea level is finally confirmed and delimited, there may be the anomaly of fringe portions of the Antarctic totality consisting of "islands" bound together for eons by a layer of solid ice rising from below-sea-level bedrock to an altitude of several thousand feet above sea level. If Marie Byrd Land should turn out to be this kind of ice-bound archipelago, what should the U. S. position be with respect to the application of the law in this case?

While the mineral resources of the area remain largely unknown, individual samples and signs of promising veins are reported with increasing frequency. Dr. Duncan Stewart of Carleton College has catalogued the 174 minerals so far reported; a small deposit of tephroite, a rare high-quality manganese ore, was found in 1957 on Clark Peninsula, an ice-free area of some 100 square miles on the Budd Coast of Wilkes Land. Sub-bituminous coal deposits are extensive but without present or probable future commercial value. A combination of the discovery of important minerals (especially rare metals or petroleum in rich concentrations) and the perfection of the portable atomic power plant might convert the Antarctic into an invaluable property within a decade. This possibility is a driving force, of course, particularly for the smaller Powers.

The general exploration and exploitation of Antarctica have been

the return. Admiral Byrd was next to sight the South Pole, but this was by plane on Nov. 28, 1929. The U. S. now operates a year-round base there, established and supplied entirely by air.

⁴⁴In Arctic Finland, land formerly submerged during the ice age has gradually emerged. Central Greenland also has regions where the ice apparently has pushed the land to an elevation below sea level.

⁴⁵Drilling for ice core samples had proceeded at Byrd Station only to a depth of 1,013 feet in early 1958. From soundings taken by the various countries during the IGY, we do know, however, that there is some 40 percent more ice in the world than previously estimated.

hampered as much by the lack of an ice-free air base as by anything else.⁴⁶ The only suitable location found thus far, Marble Point on the edge of McMurdo Sound, has now been surveyed and an initial 1,700-by-50-foot gravel runway has been put into use. Expansion of this initial strip to a length and surface adequate for major aircraft is a high priority project with American Antarctic specialists.⁴⁷ In 1957 the United States specified in its renewal of the commercial aviation agreement with Australia that service be authorized along three routes, including one over the Antarctic. An agreement is being negotiated with Brazil which would allow implementation of the Antarctic route via Rio de Janeiro. The Antarctic stop-over is planned for Marble Point. Flights from South American capitals to Melbourne and Sydney, while not of high traffic potential, would be shortened by up to 6,000 miles over present routings. There is apparently considerable official eagerness to inaugurate such service by an American carrier as soon as navigational and landing facilities permit.⁴⁸

President Roosevelt's Order of November 25, 1939, assigned a mission to the newly created (though short-lived) United States Antarctic Service and gave specific instructions to its commander, Admiral Byrd.⁴⁹ The letter order reiterated traditional policy that the "United States has never recognized any claim of sovereignty in the Antarctic regions asserted by any foreign state," and cautioned members of the United States Antarctic Service not to "take any action or make any statements tending to compromise this position." However:

Members of the Service may take any appropriate steps such as dropping written claims from airplanes, depositing such writing in cairns, et cetera, which might assist in supporting a sovereignty claim by the United States Government. Careful record shall be kept of the circumstances surrounding each such act. No public

⁴⁶ Landing strips on the ice are very treacherous and, when on the shelf, likely to deteriorate or break off and drift away, as have the Navy's best efforts in 1956, 1957 and 1958.

⁴⁷ The only other airstrip on land in the Antarctic is the 2,400-foot field of volcanic ash leveled by Sir Hubert Wilkins on Deception Island in 1928. The first flight over the region was made by him from this base, but tricky operating conditions within the island (a low, flooded cone) and length limitations have rendered the strip of little permanent value.

⁴⁸ Preliminary estimates placed the cost of an air facility comparable to the one at Thule at some \$300,000,000 over a six-year period. A more modest project, based on the absence of current military operational needs, should at least halve that figure, but the same lack of immediate military importance makes even the lesser appropriation very unlikely, barring a drastic change in the temper of the Congress. Also there appears to be some dissatisfaction among Navy planners with even the current expenditure of funds, trained personnel and equipment in the Antarctic because of the growing urgency of Arctic operations and research. Truly combined programs, fitted out with sufficient aircraft and fast nuclear ships—and operating in the Arctic from May to September, the Antarctic from October to March—would give year-round action to personnel and ships and keep U. S. interests protected at both Poles.

⁴⁹ Reproduced in U. S. National Archives, Preliminary Inventory of the Records of the United States Antarctic Service (Record Group 126), Washington: Preliminary Inventories No. 90, 1955, pp. 15-18.

announcement of such act shall, however, be made without specific authority in each case from the Secretary of State.⁵⁰

The directive for the Navy's 1946 Operation High Jump⁵¹ listed the extension and consolidation of "United States sovereignty over the largest practicable area of the Antarctic continent" as one of its objectives. Operation Windmill in 1947 was similarly instructed, as was the first Operation Deep Freeze in 1955. The universal understanding to make the IGY non-political led to the formal removal of claims objectives from the orders of subsequent phases of Operation Deep Freeze, the support force for the United States IGY stations.⁵²

III. PROSPECTS AND ISSUES

Attention to Polar problems shows every sign of increasing rather than decreasing, in spite of the turmoil and uncertainty elsewhere. Resolutions and bills have been introduced often and without success in the United States legislature to press for the assertion of a U. S. claim in Antarctica. Under consideration by the Eighty-fifth Congress were the question of continuation of the present program and a proposal to establish a "Richard E. Byrd Antarctic Commission."⁵³ Forthright action may still be remote, but members of the Congress are becoming apprised of the situation and of the need for a bold, long-range Polar policy—both from the politico-military and the scientific points of view.⁵⁴

Scholars abroad are maintaining their interest in Polar problems.⁵⁵ At home, even secondary students are being informed of the significance of the area.⁵⁶

⁵⁰ Par. 6f, *ibid.*, p. 17.

⁵¹ A training exercise in Polar combat set in the Antarctic in order to avoid any show of force in the more sensitive Arctic.

⁵² Walter Sullivan, "Antarctica in a Two-Power World," 36 *Foreign Affairs* 154-166 (1957); L. M. Gould, *op. cit.* 30. For a general description of the problems and adventures, including unusual maps, see "Compelling Continent," *Time*, Dec. 31, 1956, pp. 12-17.

⁵³ S. 2189, introduced on a bipartisan basis by Sen. Alexander Wiley of Wisconsin and 22 co-sponsors on May 31, 1957. It would create an autonomous Antarctic agency (likened to the Atomic Energy Commission) to: (a) maintain an information depository, (b) conduct laboratory and field work, (c) assist or advise in the establishment of U. S. territorial claims, (d) supervise all expeditions and activities in the Antarctic under U. S. auspices, and (e) issue required publications. *Cong. Rec.*, Senate, May 31, 1957, pp. 7269-7274. Rep. Clair Engle of California introduced a similar bill on Aug. 7, 1957.

⁵⁴ For the Administration's official policy, see part IV (4) "The Polar Areas," of the statement by Secretary of State John Foster Dulles before the Senate Foreign Relations Committee, June 6, 1958, "The Challenge of Change," 38 *Dept. of State Bulletin* 1035 at 1038 (1958).

⁵⁵ For example, Prof. Charles Rousseau of the Faculty of Law, Paris, gave a series of three lectures at the Institut Universitaire de Hautes Études Internationales in Geneva, April 28-30, 1958; his topic, "Le statut international des espaces polaires."

⁵⁶ For example, see "Men against Danger in Antarctica," *Weekly News Review* (Washington), Feb. 17, 1958, pp. 1-5, 8, maps; almost identical article in *American Observer* (Washington), Feb. 17, 1958.

An institutional framework for the treatment of the problems of either the Arctic or the Antarctic would be, under any circumstances, a major landmark in the history of international relations. A *successful* formula would yield priceless precedent in international law and organization for possible broader application at some future date. Several commentators have expressed the hope for experience in the Polar regions which could serve as a model for man's eventual regulation of the even more remote satellite, moon and outer space.

Should the Polar Regions be neutralized *or* demilitarized, if not completely internationalized? Would the world benefit from the establishment of an aerial UNEF in the Arctic? Or rather should the Polar Regions be partitioned once and for all, putting an end to bickerings resulting from overlapping claims and allowing the possessing state to proceed unhindered in an orderly development of the territory? If so, should such "territory" include those areas between land masses—or, in the extreme, even seaward reaches—covered by a virtually stationary, relatively permanent ice blanket hundreds or even thousands of feet thick?⁵⁷ Or should there be insistence on the classical rules without modification, except as power or persistence has made it possible for one state or another to disregard the traditional law in any case?

Even if some form of internationalization or neutralization of the Antarctic is possible, should the United States stake a formal claim prior to the entry into force of such an agreement in order that its participation in the "*status quo*" might be on the basis of a fully elaborated claim? If so, should all areas explored be claimed regardless of overlap with the pretensions of others, or should the United States content itself with the unclaimed sector remaining, 90 degrees to 150 degrees West?⁵⁸

Should navigational aids, weather observations and scientific studies be carried out on a merely co-operative basis, leaving performance to the individual nations concerned, or should such tasks be undertaken by some mutually supported international bureau created especially for the purpose? Should the United Nations be given jurisdiction over all such "special" territories and a permanent force created which would not only patrol all regions assigned, but administer special scientific, relief and development programs?

The major centers of power are in the Northern Hemisphere. In the Antarctic there are no natural inhabitants, while in the Arctic over one million human beings now live; virtually no vegetation is encountered at the southern end of the earth, while in the North valuable timber stands are found above 60 degrees. Yet the strategic and political problems are not

⁵⁷ Assimilation to the status of territory of the drifting pack ice is not brought into question, since here there is no real difficulty in applying the rules of the high seas stemming from the principle *res communis omnium*.

⁵⁸ See the excellent claims map, including specific indications of U. S. and other states' explorations in the whole region, appended to Adm. Byrd's *Antarctica*, the Last Frontier, fiscal year 1956 Annual Report of the Officer in Charge, Antarctic Programs (Washington: GPO, 1957, H. M. Dater, ed.).

altogether dissimilar. In spite of the fact that in some respects different factors and different countries are involved, it is conceivable that one international administration could be created to take care of both regions simultaneously. The burden of many activities is seasonal. Consequently, operations could be shifted handily from north to south, taking advantage of the summer first in the Arctic and then in the Antarctic. This would make for maximum utilization of facilities, equipment and personnel. Furthermore, much of the scientific program at both Poles needs to be co-ordinated. The Soviet Union might be hard pressed to reject military inspection in the Arctic (where its interests are deep and ancient) if the Antarctic (where its interests have been marginal and mostly of recent origin, but where American and Commonwealth involvement is heavy) were similarly treated by the same international agency. Ultimately a "Neutral Territories Council" might be appended to the main structure of United Nations organs. On the other hand, the present Trusteeship Council might well be replaced by a new organ of broader scope, a "Territorial Council," with agencies subordinated to it, including a "Trusteeship Administration," a "Neutral Inspection Administration," and a "Research and Development Administration." To be sure, action on such an all-inclusive basis is virtually out of the question. The *best* that can be expected realistically is an independent "regional" arrangement or agency, strictly limited in scope, for each Pole.

Decisions of the greatest importance to the human race are being thrust upon the leaders of the nations. They must cast about for a "partial community" in which to try out slightly more advanced forms of international administration and policing which may in time come to be recognized as a trustworthy "step in the right direction."

Twelve nations are preparing to discuss settlement of the Antarctic question in a forthcoming conference. Arctic inspection against surprise attack is part of the basis for a special disarmament meeting proposed for October, 1958.⁵⁹ Pressure increases for a permanent United Nations police force.⁶⁰ It is to be hoped that in every country the statesmen responsible will bear in mind the potential for world peace of adequate solutions to the questions of the Polar Regions.

ROBERT D. HAYTON

⁵⁹ See note from the U. S. Ambassador in Moscow to the Soviet Foreign Ministry, dated July 31, 1958, requesting talks on "methods of inspecting against surprise attack." Text in 39 Dept. of State Bulletin 278 (1958).

⁶⁰ The U. S. Senate passed a joint resolution July 31, 1958, calling for a permanent U.N. force. On Aug. 1 the Rio de Janeiro meeting of the Interparliamentary Union voted 371 to 104 (plus 50 abstentions) in favor of a resolution urging the establishment on a permanent basis of an international police force. Among those opposed were the delegates from the Soviet bloc and Yugoslavia. See the article by Sir Leslie Munro, "The Case for a Standing U.N. Army," *New York Times Magazine*, July 27, 1958, pp. 8, 27; extension of his general proposal to the technique of aerial patrols and to permanent administration of a zone prior to an "emergency" (*e.g.*, the Arctic and the Antarctic) seems not unreasonable.

53RD ANNUAL MEETING OF THE SOCIETY

The 53rd Annual Meeting of the American Society of International Law will take place at the Mayflower Hotel in Washington, D. C., from April 30 to May 2, 1959. The Committee on Annual Meeting, under the chairmanship of Professor Charles E. Martin of the University of Washington, is planning an interesting program, details of which will appear in a later number of the JOURNAL.

PEOPLE TO PEOPLE

Readers of the JOURNAL are no doubt acquainted with the program that has been carried on for several years, under the leadership of Chief Justice Robert G. Simmons of the Supreme Court of Nebraska, of soliciting surplus law books from lawyers and sending them overseas to Bar Associations, court libraries and law schools. Under this program 18,000 volumes have been sent into 34 countries. This activity has now been integrated into the People-to-People Program inaugurated by President Eisenhower two years ago.

In response to a request received from Chief Justice Simmons in January of this year, the Executive Council of the American Society of International Law authorized the donation by the Society of subscriptions to the JOURNAL to the Supreme Court Libraries in Rangoon, Burma; Accra, Ghana; Djarkarta, Indonesia; Baghdad, Iraq; Tokyo, Japan; Amman, Jordan; Lahore, Pakistan; Manila, The Philippines; Khartoum, Sudan; and Bangkok, Thailand. Owing to the limited resources of the Society, it is not in a position to make a larger contribution to the program in this way, which offers an excellent opportunity to spread knowledge of international law in regions of the world where the AMERICAN JOURNAL OF INTERNATIONAL LAW is not readily available. The opportunity should appeal to the members of the Society who are individually able to thus advance the purposes of the Society by donating subscriptions to the current volume, or sets of back issues which they no longer need.

Requests are constantly being received from abroad by Chief Justice Simmons for law books, particularly books on Constitutional Law, Comparative Law, and International Law, which are not often on the shelves of the average practicing lawyer's library. Members of the Society can also make an important contribution to the diffusion of knowledge abroad concerning the American system of law and jurisprudence, as well as with regard to international law, by donating volumes from their libraries in these fields under the People-to-People Program. Members of the Society having such books or back numbers of the JOURNAL to donate should write to Chief Justice Robert G. Simmons, Supreme Court of Nebraska, Lincoln, Nebraska.

ELEANOR H. FINCH

JUDICIAL DECISIONS

BY BRUNSON MACCHESNEY

Of the Board of Editors

Citizenship—Constitutionality of expatriation of U.S. national by birth for voting in political election in foreign state—Congressional power over foreign relations

PEREZ v. BROWNELL. 356 U.S. 44.

United States Supreme Court, March 31, 1958. Frankfurter, J.

Action by national of United States at birth for judgment for declaration of his nationality. The lower courts denied relief on the grounds plaintiff had lost his nationality under Section 401 (e) and (j) of the Nationality Act of 1940, as amended in 1944.¹ The Supreme Court, *per* Frankfurter, J., affirmed on the ground that Section 401 (e), providing for expatriation for voting in a political election in a foreign state, was a Constitutional exercise of Congressional power over foreign relations. The Constitutional validity of Section 401 (j) was expressly reserved. Chief Justice Warren, joined by Justices Black and Douglas, dissented on the ground that Congress had no Constitutional power to deprive citizens by birth or naturalization of their citizenship, even though citizens may voluntarily renounce their citizenship. Since Section 401 (e) was not limited to such voluntary actions, it was beyond the power of Congress. The Fourteenth Amendment protects this right against the exercise of governmental powers. Justice Douglas also wrote a dissent in which Justice Black concurred. Justice Whittaker filed a memorandum of dissent from the result on the ground that Section 401 (e) was too broad to be reasonably related to the exercise of Congressional power over foreign relations. The opinion of the Court² in full stated:

Petitioner, a national of the United States by birth, has been declared to have lost his American citizenship by operation of the Nationality Act of 1940, 54 Stat. 1137, as amended by the Act of September 27, 1944, 58 Stat. 746. Section 401 of that Act provided that

“A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:

.

“(e) Voting in a political election in a foreign state or participating in an election or plebiscite to determine the sovereignty over foreign territory; or

.

“(j) Departing from or remaining outside of the jurisdiction of the United States in time of war or during a period declared by the

¹ 54 Stat. 1137, 58 Stat. 746.

² Footnotes omitted.

President to be a period of national emergency for the purpose of evading or avoiding training and service in the land or naval forces of the United States.”

He seeks a reversal of the judgment against him on the ground that these provisions were beyond the power of Congress to enact.

Petitioner was born in Texas in 1909. He resided in the United States until 1919 or 1920, when he moved with his parents to Mexico, where he lived, apparently without interruption, until 1943. In 1928 he was informed that he had been born in Texas. At the outbreak of World War II, petitioner knew of the duty of male United States citizens to register for the draft, but he failed to do so. In 1943 he applied for admission to the United States as an alien railroad laborer, stating that he was a native-born citizen of Mexico, and was granted permission to enter on a temporary basis. He returned to Mexico in 1944 and shortly thereafter applied for and was granted permission, again as a native-born Mexican citizen, to enter the United States temporarily to continue his employment as a railroad laborer. Later in 1944 he returned to Mexico once more. In 1947 petitioner applied for admission to the United States at El Paso, Texas, as a citizen of the United States. At a Board of Special Inquiry hearing (and in his subsequent appeals to the Assistant Commissioner and the Board of Immigration Appeals), he admitted having remained outside of the United States to avoid military service and having voted in political elections in Mexico. He was ordered excluded on the ground that he had expatriated himself; this order was affirmed on appeal. In 1952 petitioner, claiming to be a native-born citizen of Mexico, was permitted to enter the United States as an alien agricultural laborer. He surrendered in 1953 to immigration authorities in San Francisco as an alien unlawfully in the United States but claimed the right to remain by virtue of his American citizenship. After a hearing before a Special Inquiry Officer, he was ordered deported as an alien not in possession of a valid immigration visa; this order was affirmed on appeal to the Board of Immigration Appeals.

Petitioner brought suit in 1954 in a United States District Court for a judgment declaring him to be a national of the United States. The court, sitting without a jury, found (in addition to the undisputed facts set forth above) that petitioner had remained outside of the United States from November 1944 to July 1947 for the purpose of avoiding service in the armed forces of the United States and that he had voted in a “political election” in Mexico in 1946. The court, concluding that he had thereby expatriated himself, denied the relief sought by the petitioner. The United States Court of Appeals for the Ninth Circuit affirmed. 235 F.2d 364. We granted certiorari because of the constitutional questions raised by the petitioner. 352 U.S. 908.

Statutory expatriation, as a response to problems of international relations, was first introduced just a half century ago. Long before that, however, serious friction between the United States and other nations had stirred consideration of modes of dealing with the difficulties that arose out of the conflicting claims to the allegiance of foreign-born persons

naturalized in the United States, particularly when they returned to the country of their origin.

As a starting point for grappling with this tangle of problems, Congress in 1868 formally announced the traditional policy of this country that it is the "natural and inherent right of all people" to divest themselves of their allegiance to any state, 15 Stat. 223, R. S. § 1999. Although the impulse for this legislation has been the refusal by other nations, notably Great Britain, to recognize a right in naturalized Americans who had been their subjects to shed that former allegiance, the Act of 1868 was held by the Attorney General to apply to divestment by native-born and naturalized Americans of their United States citizenship. 14 Op. Atty. Gen. 295, 296. In addition, while the debate on the Act of 1868 was proceeding, negotiations were completed on the first of a series of treaties for the adjustment of some of the disagreements that were constantly arising between the United States and other nations concerning citizenship. These instruments typically provided that each of the signatory nations would regard as a citizen of the other such of its own citizens as became naturalized by the other. *E.g.*, Treaty with the North German Confederation, Feb. 22, 1868, 2 Treaties, Conventions, International Acts, etc. (comp. Malloy, 1910), 1298. This series of treaties initiated this country's policy of automatic divestment of citizenship for specified conduct affecting our foreign relations.

On the basis, presumably, of the Act of 1868 and such treaties as were in force, it was the practice of the Department of State during the last third of the nineteenth century to make rulings as to forfeiture of United States citizenship by individuals who performed various acts abroad. See Borchard, *Diplomatic Protection of Citizens Abroad*, §§ 319, 324. Naturalized citizens who returned to the country of their origin were held to have abandoned their citizenship by such actions as accepting public office there or assuming political duties. See Davis to Weile, Apr. 18, 1870, 3 Moore, *Digest of International Law*, 737; Davis to Taft, Jan. 18, 1883, 3 *id.*, at 739. Native-born citizens of the United States (as well as naturalized citizens outside of the country of their origin) were generally deemed to have lost their American citizenship only if they acquired foreign citizenship. See Bayard to Suzzara-Verdi, Jan. 27, 1887, 3 *id.*, at 714; see also *Comitis v. Parkerson*, 56 F.556, 559.

No one seems to have questioned the necessity of having the State Department, in its conduct of the foreign relations of the Nation, pass on the validity of claims to American citizenship and to such of its incidents as the right to diplomatic protection. However, it was recognized in the Executive Branch that the Department had no specific legislative authority for nullifying citizenship, and several of the Presidents urged Congress to define the acts by which citizens should be held to have expatriated themselves. *E.g.*, Message of President Grant to Congress, Dec. 7, 1874, 7 Messages & Papers of the Presidents (Richardson ed. 1899) 284, 291-292. Finally in 1906, during the consideration of the bill that became the Naturalization Act of 1906, a Senate resolution and a recommendation

of the House Committee on Foreign Affairs called for an examination of the problems relating to American citizenship, expatriation and protection abroad. In response to these suggestions the Secretary of State appointed the Citizenship Board of 1906, composed of the Solicitor of the State Department, the Minister to the Netherlands and the Chief of the Passport Bureau. The board conducted a study and late in 1906 made an extensive report with recommendations for legislation.

Among the recommendations of the board were that expatriation of a citizen "be assumed" when, in time of peace, he became naturalized in a foreign state, engaged in the service of a foreign state where such service involved the taking of an oath of allegiance to that state, or domiciled in a foreign state for five years with no intention to return. Citizenship of the United States, Expatriation, and Protection Abroad, H.R. Doc. No. 326, 59th Cong., 2d Sess. 23. It also recommended that an American woman who married a foreigner be regarded as losing her American citizenship during coverture. *Id.*, at 29. As to the first two recommended acts of expatriation, the report stated that "no man should be permitted deliberately to place himself in a position where his services may be claimed by more than one government and his allegiance be due to more than one." *Id.*, at 23. As to the third, the board stated that more and more Americans were going abroad to live "and the question of their protection causes increasing embarrassment to this Government in its relations with foreign powers." *Id.*, at 25.

Within a month of the submission of this report a bill was introduced in the House by Representative Perkins of New York based on the board's recommendations. Perkins' bill provided that a citizen would be "deemed to have expatriated himself" when, in peacetime, he became naturalized in a foreign country or took an oath of allegiance to a foreign state; it was presumed that a naturalized citizen who resided for five years in a foreign state had ceased to be an American citizen, and an American woman who married a foreigner would take the nationality of her husband. 41 Cong. Rec. 1463-1464. Perkins stated that the bill was designed to discourage people from evading responsibilities both to other countries and to the United States and "to save our Government [from] becoming involved in any trouble or question with foreign countries where there is no just reason." 41 *id.*, at 1464. What little debate there was on the bill centered around the foreign domicile provision; no constitutional issue was canvassed. The bill passed the House, and, after substantially no debate and the adoption of a committee amendment adding a presumption of termination of citizenship for a naturalized citizen who resided for two years in the country of his origin, 41 Cong. Rec. 4116, the Senate passed it and it became the Expatriation Act of 1907. 34 Stat. 1228.

The question of the power of Congress to enact legislation depriving individuals of their American citizenship was first raised in the courts by *Mackenzie v. Hare*, 239 U.S. 299. The plaintiff in that action, Mrs. Mackenzie, was a native-born citizen and resident of the United States. In 1909 she married a subject of Great Britain and continued to reside

with him in the United States. When, in 1913, she applied to the defendants, members of a board of elections in California, to be registered as a voter, her application was refused on the ground that by reason of her marriage she had ceased to be a citizen of the United States. Her petition for a writ of mandamus was denied in the State courts of California, and she sued out a writ of error here, claiming that if the Act of 1907 was intended to apply to her it was beyond the power of Congress. The Court, through Mr. Justice McKenna, after finding that merging the identity of husband and wife, as Congress had done in this instance, had a "purpose and, it may be, necessity, in international policy," continued:

"As a government, the United States is invested with all the attributes of sovereignty. As it has the character of nationality it has the powers of nationality, especially those which concern its relations and intercourse with other countries. We should hesitate long before limiting or embarrassing such powers. . . . We concur with counsel that citizenship is of tangible worth, and we sympathize with plaintiff in her desire to retain it and in her earnest assertion of it. But there is involved more than personal considerations. As we have seen, the legislation was urged by conditions of national moment. . . . It is the conception of the legislation under review that such an act may bring the Government into embarrassments and, it may be, into controversies. . . ." 239 U.S., at 311-312.

The Court observed that voluntary marriage of an American woman with a foreigner may have the same consequences, and "involve national complications of like kind," as voluntary expatriation in the traditional sense. It concluded: "This is no arbitrary exercise of government." 239 U.S., at 312. See also *Ex parte Griffin*, 237 F. 445; *Ex parte Ng Fung Sing*, 6 F.2d 670.

By the early 1930's, the American law on nationality, including naturalization and denationalization, was expressed in a large number of provisions scattered throughout the statute books. Some of the specific laws enacted at different times seemed inconsistent with others, some problems of growing importance had emerged that Congress had left unheeded. At the request of the House Committee on Immigration and Naturalization, see 86 Cong. Rec. 11943, President Franklin D. Roosevelt established a Committee composed of the Secretary of State, the Attorney General and the Secretary of Labor to review the nationality laws of the United States, to recommend revisions and to codify the nationality laws into one comprehensive statute for submission to Congress; he expressed particular concern about "existing discriminations" in the law. Exec. Order No. 6115, Apr. 25, 1933. The necessary research for such a study was entrusted to specialists representing the three departments. Five years were spent by these officials in the study and formulation of a draft code. In their letter submitting the draft code to the President after it had been reviewed within the Executive Branch, the Cabinet Committee noted the special importance of the provisions concerning loss of nationality and asserted

that none of these provisions was "designed to be punitive or to interfere with freedom of action"; they were intended to deprive of citizenship those persons who had shown that "their real attachment is to the foreign country and not to the United States." Codification of the Nationality Laws of the United States, H.R. Comm. Print, pt. 1, 76th Cong., 1st Sess. v-vii.

The draft code of the Executive Branch was an omnibus bill in five chapters. The chapter relating to "Loss of Nationality" provided that any citizen should "lose his nationality" by becoming naturalized in a foreign country; taking an oath of allegiance to a foreign state; entering or serving in the armed forces of a foreign state; being employed by a foreign government in a post for which only nationals of that country are eligible; voting in a foreign political election or plebiscite; using a passport of a foreign state as a national thereof; formally renouncing American citizenship before a consular officer abroad; deserting the armed forces of the United States in wartime (upon conviction by court martial); if a naturalized citizen, residing in the state of his former nationality or birth for two years if he thereby acquires the nationality of that state; or, if a naturalized citizen, residing in the state of his former nationality or birth for three years. *Id.*, at 66-76.

In support of the recommendation of voting in a foreign political election as an act of expatriation, the Committee reported:

"Taking an active part in the political affairs of a foreign state by voting in a political election therein is believed to involve a political attachment and practical allegiance thereto which is inconsistent with continued allegiance to the United States, whether or not the person in question has or acquires the nationality of the foreign state. In any event it is not believed that an American national should be permitted to participate in the political affairs of a foreign state and at the same time retain his American nationality. The two facts would seem to be inconsistent with each other." *Id.*, at 67.

As to the reference to plebiscites in the draft language, the report states: "If this provision had been in effect when the Saar Plebiscite was held, Americans voting in it would have been expatriated." *Ibid.* It seems clear that the most immediate impulse for the entire voting provision was the participation by many naturalized Americans in the plebiscite to determine sovereignty over the Saar in January 1935. H.R. Rep. No. 216, 74th Cong., 1st Sess. 1. Representative Dickstein of New York, chairman of the House Committee on Immigration and Naturalization, who had called the plebiscite an "international dispute" in which naturalized American citizens could not properly participate, N. Y. Times, Jan. 4, 1935, p. 12, col. 3, had introduced a bill in the House in 1935 similar in language to the voting provisions in the draft code, 79 Cong. Rec. 2050, but, although it was favorably reported, the House did not pass it.

In June 1938 the President submitted the Cabinet Committee's draft code and the supporting report to Congress. In due course, Chairman

Dickstein introduced the code as H.R. 6127, and it was referred to his committee. In early 1940 extensive hearings were held before both a subcommittee and the full committee at which the interested Executive Branch agencies and others testified. With respect to the voting provision, Chairman Dickstein spoke of the Americans who had voted in the Saar plebiscite and said, "If they are American citizens they had no right to vote, to interfere with foreign matters or political subdivision." Hearings before House Committee on Immigration and Naturalization on H.R. 6127, 76th Cong., 1st Sess. 287. Mr. Flournoy, Assistant Legal Adviser of the State Department, said that the provision would be "particularly applicable" to persons of dual nationality, *id.*, at 132; however, a suggestion that the provision be made applicable only to dual nationals, *id.*, at 398, was not adopted.

Upon the conclusion of the hearings in June 1940 a new bill was drawn up and introduced as H.R. 9980. The only changes from the Executive Branch draft with respect to the acts of expatriation were the deletion of using a foreign passport and the addition of residence by a naturalized citizen for five years in any foreign country as acts that would result in loss of nationality. 86 Cong. Rec. 11960-11961. The House debated the bill for a day in September 1940. In briefly summarizing the loss of nationality provisions of the bill, Chairman Dickstein said that "this bill would put an end to dual citizenship and relieve this country of the responsibility of those who reside in foreign lands and only claim citizenship when it serves their purpose." *Id.*, at 11944. Representative Rees of Kansas, who had served as chairman of the subcommittee that studied the draft code, said that clarifying legislation was needed, among other reasons, "because of the duty of the Government to protect citizens abroad." *Id.*, at 11947. The bill passed the House that same day. *Id.*, at 11965.

In the Senate also, after a favorable report from the Committee on Immigration, the bill was debated very briefly. Committee amendments were adopted making the provision on foreign military service applicable only to dual nationals, making treason an act of expatriation and providing a procedure by which persons administratively declared to have expatriated themselves might obtain judicial determinations of citizenship. The bill as amended was passed. *Id.*, at 12817-12818. The House agreed to these and all other amendments on which the Senate insisted, *id.*, at 13250, and, on October 14, the Nationality Act of 1940 became law. 54 Stat. 1137.

The loss of nationality provisions of the Act constituted but a small portion of a long omnibus nationality statute. It is not surprising, then, that they received as little attention as they did in debate and hearings and that nothing specific was said about the constitutional basis for their enactment. The bill as a whole was regarded primarily as a codification—and only secondarily as a revision—of statutes that had been in force for many years, some of them, such as the naturalization provisions, having their beginnings in legislation 150 years old. It is clear that, as is so

often the case in matters affecting the conduct of foreign relations, Congress was guided by and relied very heavily upon the advice of the Executive Branch, and particularly the State Department. See, *e.g.*, 86 Cong. Rec. 11943-11944. In effect, Congress treated the Cabinet Committee as it normally does its own committees charged with studying a problem and formulating legislation. These considerations emphasize the importance, in the inquiry into congressional power in this field, of keeping in mind the historical background of the challenged legislation, for history will disclose the purpose fairly attributable to Congress in enacting the statute.

The first step in our inquiry must be to answer the question: what is the source of power on which Congress must be assumed to have drawn? Although there is in the Constitution no specific grant to Congress of power to enact legislation for the effective regulation of foreign affairs, there can be no doubt of the existence of this power in the law-making organ of the Nation. See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318; *Mackenzie v. Hare*, 239 U.S. 299, 311-312. The States that joined together to form a single Nation and to create, through the Constitution, a Federal Government to conduct the affairs of that Nation must be held to have granted that Government the powers indispensable to its functioning effectively in the company of sovereign nations. The Government must be able not only to deal affirmatively with foreign nations, as it does through the maintenance of diplomatic relations with them and the protection of American citizens sojourning within their territories. It must also be able to reduce to a minimum the frictions that are unavoidable in a world of sovereigns sensitive in matters touching their dignity and interests.

The inference is fairly to be drawn from the congressional history of the Nationality Act of 1940, read in light of the historical background of expatriation in this country, that, in making voting in foreign elections (among other behavior) an act of expatriation, Congress was seeking to effectuate its power to regulate foreign affairs. The legislators, counseled by those on whom they rightly relied for advice, were concerned about actions by citizens in foreign countries that create problems of protection and are inconsistent with American allegiance. Moreover, we cannot ignore the fact that embarrassments in the conduct of foreign relations were of primary concern in the consideration of the Act of 1907, of which the loss of nationality provisions of the 1940 Act are a codification and expansion.

Broad as the power in the National Government to regulate foreign affairs must necessarily be, it is not without limitation. The restrictions confining Congress in the exercise of any of the powers expressly delegated to it in the Constitution apply with equal vigor when that body seeks to regulate our relations with other nations. Since Congress may not act arbitrarily, a rational nexus must exist between the content of a specific power in Congress and the action of Congress in carrying that power into execution. More simply stated, the means—in this case, with-

drawal of citizenship—must be reasonably related to the end—here, regulation of foreign affairs. The inquiry—and, in the case before us, the sole inquiry—into which this Court must enter is whether or not Congress may have concluded not unreasonably that there is a relevant connection between this fundamental source of power and the ultimate legislative action.

Our starting point is to ascertain whether the power of Congress to deal with foreign relations may reasonably be deemed to include a power to deal generally with the active participation, by way of voting, of American citizens in foreign political elections. Experience amply attests that, in this day of extensive international travel, rapid communication and widespread use of propaganda, the activities of the citizens of one nation when in another country can easily cause serious embarrassments to the government of their own country as well as to their fellow citizens. We cannot deny to Congress the reasonable belief that these difficulties might well become acute, to the point of jeopardizing the successful conduct of international relations, when the citizen of one country chooses to participate in the political or governmental affairs of another country. The citizen may by his action unwittingly promote or encourage a course of conduct contrary to the interests of his own government; moreover, the people or government of the foreign country may regard his action to be the action of his government, or at least as a reflection if not an expression of its policy. Cf. Preuss, *International Responsibility for Hostile Propaganda Against Foreign States*, 28 *Am. J. Int'l L.* 649, 650.

It follows that such activity is regulable by Congress under its power to deal with foreign affairs. And it must be regulable on more than *ad hoc* basis. The subtle influences and repercussions with which the government must deal make it reasonable for the generalized, although clearly limited, category of "political election" to be used in defining the area of regulation. That description carries with it the scope and meaning of its context and purpose; classes of elections—nonpolitical in the colloquial sense as to which participation by Americans could not possibly have any effect on the relations of the United States with another country are excluded by any rational construction of the phrase. The classification that Congress has adopted cannot be said to be inappropriate to the difficulties to be dealt with. Specific applications are of course open to judicial challenge, as are other general categories in the law, by a "gradual process of judicial inclusion and exclusion." *Davidson v. New Orleans*, 96 U.S. 97, 104.

The question must finally be faced whether, given the power at attach some sort of consequence to voting in a foreign political election, Congress, acting under the Necessary and Proper Clause, Art. I, § 8, cl. 18, could attach loss of nationality to it. Is the means, withdrawal of citizenship, reasonably calculated to effect the end that is within the power of Congress to achieve, the avoidance of embarrassment in the conduct of our foreign relations attributable to voting by American citizens in foreign political elections? The importance and extreme delicacy of the matters here sought to be regulated demand that Congress be permitted ample scope in selecting appropriate modes for accomplishing its purpose. The critical

connection between this conduct and loss of citizenship is the fact that it is the possession of American citizenship by a person committing the act that makes the act potentially embarrassing to the American Government and pregnant with the possibility of embroiling this country in disputes with other nations. The termination of citizenship terminates the problem. Moreover, the fact is not without significance that Congress has interpreted this conduct, not irrationally, as importing not only something less than complete and unswerving allegiance to the United States but also elements of an allegiance to another country in some measure, at least, inconsistent with American citizenship.

Of course, Congress can attach loss of citizenship only as a consequence of conduct engaged in voluntarily. See *Mackenzie v. Hare*, 239 U.S. 299, 311-312. But it would be a mockery of this Court's decisions to suggest that a person, in order to lose his citizenship, must intend or desire to do so. The Court only a few years ago said of the person held to have lost her citizenship in *Mackenzie v. Hare*, *supra*: "The woman had not intended to give up her American citizenship." *Savorgnan v. United States*, 338 U.S. 491, 501. And the latter case sustained the denationalization of Mrs. Savorgnan although it was not disputed that she "had no intention of endangering her American citizenship or of renouncing her allegiance to the United States." 338 U.S., at 495. What both women did do voluntarily was to engage in conduct to which Acts of Congress attached the consequences of denationalization irrespective of—and, in those cases, absolutely contrary to—the intentions and desires of the individuals. Those two cases mean nothing—indeed, they are deceptive—if their essential significance is not rejection of the notion that the power of Congress to terminate citizenship depends upon the citizen's assent. It is a distortion of those cases to explain them away on a theory that a citizen's assent to denationalization may be inferred from his having engaged in conduct that amounts to an "abandonment of citizenship" or a "transfer of allegiance." Certainly an Act of Congress cannot be invalidated by resting decisive precedents on a gross fiction—a fiction baseless in law and contradicted by the facts of the cases.

It cannot be said, then, that Congress acted without warrant when, pursuant to its power to regulate the relations of the United States with foreign countries, it provided that anyone who votes in a foreign election of significance politically in the life of another country shall lose his American citizenship. To deny the power of Congress to enact the legislation challenged here would be to disregard the constitutional allocation of governmental functions that it is this Court's solemn duty to guard.

Because of our view concerning the power of Congress with respect to § 401 (e) of the Nationality Act of 1940, we find it unnecessary to consider—indeed, it would be improper for us to adjudicate—the constitutionality of § 401 (j), and we expressly decline to rule on that important question at this time.

Citizenship—unconstitutionality of expatriation of U.S. national by birth for conviction and dishonorable discharge by court martial for desertion in wartime—power of Congress

TROP v. DULLES. 356 U.S. 86.

United States Supreme Court, March 31, 1958.

Petitioner had been denied a passport on the ground that he had lost his citizenship because of his prior conviction and dishonorable discharge for wartime desertion by virtue of Section 401 (g) of the Nationality Act of 1940, as amended. He sought a declaratory judgment that he was still a citizen. The lower courts refused relief. The Supreme Court reversed, holding Section 401 (g) unconstitutional. Justice Frankfurter, joined by Justices Burton, Clark, and Harlan, dissented. Chief Justice Warren announced the judgment of the Court and delivered an opinion in which Justices Black, Douglas, and Whittaker joined. Justice Black wrote a separate concurring opinion in which Justice Douglas joined. Justice Brennan delivered a separate concurring opinion. The opinion of Chief Justice Warren in full¹ stated:

The petitioner in this case, a native-born American, is declared to have lost his United States citizenship and become stateless by reason of his conviction by court-martial for wartime desertion. As in *Perez v. Brownell*, ante, p. 44,² the issue before us is whether this forfeiture of citizenship comports with the Constitution.

The facts are not in dispute. In 1944 petitioner was a private in the United States Army, serving in French Morocco. On May 22, he escaped from a stockade at Casablanca, where he had been confined following a previous breach of discipline. The next day petitioner and a companion were walking along a road towards Rabat, in the general direction back to Casablanca, when an Army truck approached and stopped. A witness testified that petitioner boarded the truck willingly and that no words were spoken. In Rabat petitioner was turned over to military police. Thus ended petitioner's "desertion." He had been gone less than a day and had willingly surrendered to an officer on an Army vehicle while he was walking back towards his base. He testified that at the time he and his companion were picked up by the Army truck, "we had decided to return to the stockade. The going was tough. We had no money to speak of, and at the time we were on foot and we were getting cold and hungry." A general court-martial convicted petitioner of desertion and sentenced him to three years at hard labor, forfeiture of all pay and allowances and a dishonorable discharge.

In 1952 petitioner applied for a passport. His application was denied on the ground that under the provisions of Section 401 (g) of the Nationality Act of 1940, as amended, he had lost his citizenship by reason of his conviction and dishonorable discharge for wartime desertion. In 1955 petitioner commenced this action in the District Court, seeking a declaratory judgment that he is a citizen. The Government's motion for summary judgment was granted, and the Court of Appeals for the Second

¹ Footnotes omitted.

² See p. 767 above.

Circuit affirmed, Chief Judge Clark dissenting. 239 F.2d 527. We granted certiorari. 352 U.S. 1023.

Section 401 (g), the statute that decrees the forfeiture of this petitioner's citizenship, is based directly on a Civil War statute, which provided that a deserter would lose his "rights of citizenship." The meaning of this phrase was not clear. When the 1940 codification and revision of the nationality laws was prepared, the Civil War statute was amended to make it certain that what a convicted deserter would lose was nationality itself. In 1944 the statute was further amended to provide that a convicted deserter would lose his citizenship only if he was dismissed from the service or dishonorably discharged. At the same time it was provided that citizenship could be regained if the deserter was restored to active duty in wartime with the permission of the military authorities.

Though these amendments were added to ameliorate the harshness of the statute, their combined effect produces a result that poses far graver problems than the ones that were sought to be solved. Section 401 (g) as amended now gives the military authorities complete discretion to decide who among convicted deserters shall continue to be Americans and who shall be stateless. By deciding whether to issue and execute a dishonorable discharge and whether to allow a deserter to re-enter the armed forces, the military becomes the arbiter of citizenship. And the domain given to it by Congress is not as narrow as might be supposed. Though the crime of desertion is one of the most serious in military law, it is by no means a rare event for a soldier to be convicted of this crime. The elements of desertion are simply absence from duty plus the intention not to return. In this category falls a great range of conduct, which may be prompted by a variety of motives—fear, laziness, hysteria, or any emotional imbalance. The offense may occur not only in combat but also in training camps for draftees in this country. The Solicitor General informed the Court that during World War II, according to Army estimates, approximately 21,000 soldiers and airmen were convicted of desertion and given dishonorable discharges by the sentencing courts-martial and that about 7,000 of these were actually separated from the service and thus rendered stateless when the reviewing authorities refused to remit their dishonorable discharges. Over this group of men, enlarged by whatever the corresponding figures may be for the Navy and Marines, the military has been given the power to grant or withhold citizenship. And the number of youths subject to this power could easily be enlarged simply by expanding the statute to cover crimes other than desertion. For instance, a dishonorable discharge itself might in the future be declared to be sufficient to justify forfeiture of citizenship.

Three times in the past three years we have been confronted with cases presenting important questions bearing on the proper relationship between civilian and military authority in this country. A statute such as Section 401 (g) raises serious issues in this area, but in our view of this case it is unnecessary to deal with those problems. We conclude that the judgment in this case must be reversed for the following reasons.

I.

In *Perez v. Brownell*, *supra*, I expressed the principles that I believe govern the constitutional status of United States citizenship. It is my conviction that citizenship is not subject to the general powers of the National Government and therefore cannot be divested in the exercise of those powers. The right may be voluntarily relinquished or abandoned either by express language or by language and conduct that show a renunciation of citizenship.

Under these principles, this petitioner has not lost his citizenship. Desertion in wartime, though it may merit the ultimate penalty, does not necessarily signify allegiance to a foreign state. Section 401 (g) is not limited to cases of desertion to the enemy, and there is no such element in this case. This soldier committed a crime for which he should be and was punished, but he did not involve himself in any way with a foreign state. There was no dilution of his allegiance to this country. The fact that the desertion occurred on foreign soil is of no consequence. The Solicitor General acknowledged that forfeiture of citizenship would have occurred if the entire incident had transpired in this country.

Citizenship is not a license that expires upon misbehavior. The duties of citizenship are numerous, and the discharge of many of these obligations is essential to the security and well-being of the Nation. The citizen who fails to pay his taxes or to abide by the laws safeguarding the integrity of elections deals a dangerous blow to his country. But could a citizen be deprived of his nationality for evading these basic responsibilities of citizenship? In time of war the citizen's duties include not only the military defense of the Nation but also full participation in the manifold activities of the civilian ranks. Failure to perform any of these obligations may cause the Nation serious injury, and, in appropriate circumstances, the punishing power is available to deal with derelictions of duty. But citizenship is not lost every time a duty of citizenship is shirked. And the deprivation of citizenship is not a weapon that the Government may use to express its displeasure at a citizen's conduct, however reprehensible that conduct may be. As long as a person does not voluntarily renounce or abandon his citizenship, and this petitioner has done neither, I believe his fundamental right of citizenship is secure. On this ground alone the judgment in this case should be reversed.

II.

Since a majority of the Court concluded in *Perez v. Brownell* that citizenship may be divested in the exercise of some governmental power, I deem it appropriate to state additionally why the action taken in this case exceeds constitutional limits, even under the majority's decision in *Perez*. The Court concluded in *Perez* that citizenship could be divested in the exercise of the foreign affairs power. In this case, it is urged that the war power is adequate to support the divestment of citizenship. But there is a vital difference between the two statutes that purport to implement

these powers by decreeing loss of citizenship. The statute in *Perez* decreed loss of citizenship—so the majority concluded—to eliminate those international problems that were thought to arise by reason of a citizen's having voted in a foreign election. The statute in this case, however, is entirely different. Section 401 (g) decrees loss of citizenship for those found guilty of the crime of desertion. It is essentially like Section 401 (j) of the Nationality Act, decreeing loss of citizenship for evading the draft by remaining outside the United States. This provision was also before the Court in *Perez*, but the majority declined to consider its validity. While Section 401 (j) decrees loss of citizenship without providing any semblance of procedural due process whereby the guilt of the draft evader may be determined before the sanction is imposed, Section 401 (g), the provision in this case, accords the accused deserter at least the safeguards of an adjudication of guilt by a court-martial.

The constitutional question posed by Section 401 (g) would appear to be whether or not denationalization may be inflicted as a punishment, even assuming that citizenship may be divested pursuant to some governmental power. But the Government contends that this statute does not impose a penalty and that constitutional limitations on the power of Congress to punish are therefore inapplicable. We are told this is so because a committee of cabinet members, in recommending this legislation to the Congress, said it "technically is not a penal law." How simple would be the tasks of constitutional adjudication and of law generally if specific problems could be solved by inspection of the labels pasted on them! Manifestly the issue of whether Section 401 (g) is a penal law cannot be thus determined. Of course it is relevant to know the classification employed by the cabinet committee that played such an important role in the preparation of the Nationality Act of 1940. But it is equally relevant to know that this very committee acknowledged that Section 401 (g) was based on the provisions of the 1865 Civil War statute, which the committee itself termed "distinctly penal in character." Furthermore, the 1865 statute states in terms that deprivation of the rights of citizenship is "in addition to the other lawful penalties of the crime of desertion. . . ." And certainly it is relevant to know that the reason given by the Senate Committee on Immigration as to why loss of nationality under Section 401 (g) can follow desertion only after conviction by court-martial was "because the penalty is so drastic." Doubtless even a clear legislative classification of a statute as "non-penal" would not alter the fundamental nature of a plainly penal statute. With regard to Section 401 (g) the fact is that the views of the cabinet committee and of the Congress itself as to the nature of the statute are equivocal, and cannot possibly provide the answer to our inquiry. Determination of whether this statute is a penal law requires careful consideration.

In form Section 401 (g) appears to be a regulation of nationality. The statute deals initially with the status of nationality and then specifies the conduct that will result in the loss of that status. But surely form cannot provide the answer to this inquiry. A statute providing that "a person

shall lose his liberty by committing bank robbery," though in form a regulation of liberty, would nonetheless be penal. Nor would its penal effect be altered by labeling it a regulation of banks or by arguing that there is a rational connection between safeguarding banks and imprisoning bank robbers. The inquiry must be directed to substance.

This Court has been called upon to decide whether or not various statutes were penal ever since 1798. *Calder v. Bull*, 3 Dall. 386. Each time a statute has been challenged as being in conflict with the constitutional prohibitions against bills of attainder and *ex post facto* laws, it has been necessary to determine whether a penal law was involved, because these provisions apply only to statutes imposing penalties. In deciding whether or not a law is penal, this Court has generally based its determination upon the purpose of the statute. If the statute imposes a disability for the purposes of punishment—that is, to reprimand the wrongdoer, to deter others, etc., it has been considered penal. But a statute has been considered nonpenal if it imposes a disability, not to punish, but to accomplish some other legitimate governmental purpose. The Court has recognized that any statute decreeing some adversity as a consequence of certain conduct may have both a penal and a nonpenal effect. The controlling nature of such statutes normally depends on the evident purpose of the legislature. The point may be illustrated by the situation of an ordinary felon. A person who commits a bank robbery, for instance, loses his right to liberty and often his right to vote. If, in the exercise of the power to protect banks, both sanctions were imposed for the purpose of punishing bank robbers, the statutes authorizing both disabilities would be penal. But because the purpose of the latter statute is to designate a reasonable ground of eligibility for voting, this law is sustained as a nonpenal exercise of the power to regulate the franchise.

The same reasoning applies to Section 401 (g). The purpose of taking away citizenship from a convicted deserter is simply to punish him. There is no other legitimate purpose that the statute could serve. Denationalization in this case is not even claimed to be a means of solving international problems, as was argued in *Perez*. Here the purpose is punishment, and therefore the statute is a penal law.

It is urged that this statute is not a penal law but a regulatory provision authorized by the war power. It cannot be denied that Congress has power to prescribe rules governing the proper performance of military obligations, of which perhaps the most significant is the performance of one's duty when hazardous or important service is required. But a statute that prescribes the consequence that will befall one who fails to abide by these regulatory provisions is a penal law. Plainly legislation prescribing imprisonment for the crime of desertion is penal in nature. If loss of citizenship is substituted for imprisonment, it cannot fairly be said that the use of this particular sanction transforms the fundamental nature of the statute. In fact, a dishonorable discharge with consequent loss of citizenship might be the only punishment meted out by a court-martial. During World War II the threat of this punishment was ex-

PLICITLY communicated by the Army to soldiers in the field. If this statute taking away citizenship is a congressional exercise of the war power, then it cannot rationally be treated other than as a penal law, because it imposes the sanction of denationalization for the purpose of punishing transgression of a standard of conduct prescribed in the exercise of that power.

The Government argues that the sanction of denationalization imposed by Section 401 (g) is not a penalty because deportation has not been so considered by this Court. While deportation is undoubtedly a harsh sanction that has a severe penal effect, this Court has in the past sustained deportation as an exercise of the sovereign's power to determine the conditions upon which an alien may reside in this country. For example, the statute authorizing deportation of an alien convicted under the 1917 Espionage Act was viewed, not as designed to punish him for the crime of espionage, but as an implementation of the sovereign power to exclude, from which the deporting power is derived. *Mahler v. Eby*, 264 U. S. 32. This view of deportation may be highly fictional, but even if its validity is conceded, it is wholly inapplicable to this case. No one contends that the Government has, in addition to the power to exclude all aliens, a sweeping power to denationalize all citizens. Nor does comparison to denaturalization eliminate the penal effect of denationalization in this case. Denaturalization is not imposed to penalize the alien for having falsified his application of citizenship; if it were, it would be a punishment. Rather, it is imposed in the exercise of the power to make rules for the naturalization of aliens. In short, the fact that deportation and denaturalization for fraudulent procurement of citizenship may be imposed for purposes other than punishment affords no basis for saying that in this case denationalization is not a punishment.

Section 401 (g) is a penal law, and we must face the question whether the Constitution permits the Congress to take away citizenship as a punishment for crime. If it is assumed that the power of Congress extends to divestment of citizenship, the problem still remains as to this statute whether denationalization is a cruel and unusual punishment within the meaning of the Eighth Amendment. Since wartime desertion is punishable by death, there can be no argument that the penalty of denationalization is excessive in relation to the gravity of the crime. The question is whether this penalty subjects the individual to a fate forbidden by the principle of civilized treatment guaranteed by the Eighth Amendment.

At the outset, let us put to one side the death penalty as an index of the constitutional limit on punishment. Whatever the arguments may be against capital punishment, both on moral grounds and in terms of accomplishing the purposes of punishment—and they are forceful, the death penalty has been employed throughout our history, and in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty. But it is equally plain that the existence of the death penalty is not a license to the Government to devise any punishment short of death within the limit of its imagination.

The exact scope of the constitutional phrase "cruel and unusual" has not been detailed by this Court. But the basic policy reflected in these words is firmly established in the Anglo-American tradition of criminal justice. The phrase in our Constitution was taken directly from the English declaration of Rights of 1688, and the principle it represents can be traced back to the Magna Carta. The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards. Fines, imprisonment and even execution may be imposed depending upon the enormity of the crime, but any technique outside the bounds of these traditional penalties is constitutionally suspect. This Court has had little occasion to give precise content to the Eighth Amendment, and in an enlightened democracy such as ours, this is not surprising. But when the Court was confronted with a punishment of 12 years in irons at hard and painful labor imposed for the crime of falsifying public records, it did not hesitate to declare that the penalty was cruel in its excessiveness and unusual in its character. *Weems v. United States*, 217 U. S. 349. The Court recognized in that case that the words of the Amendment are not precise, and that their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.

We believe, as did Chief Judge Clark in the court below, that use of denationalization as a punishment is barred by the Eighth Amendment. There may be involved no physical mistreatment, no primitive torture. There is instead the total destruction of the individual's status in organized society. It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development. The punishment strips the citizen of his status in the national and international political community. His very existence is at the sufferance of the country in which he happens to find himself. While any one country may accord him some rights, and presumably as long as he remained in this country he would enjoy the limited rights of an alien, no country need do so because he is stateless. Furthermore, his enjoyment of even the limited rights of an alien might be subject to termination at any time by reason of deportation. In short, the expatriate has lost the right to have rights.

This punishment is offensive to cardinal principles for which the Constitution stands. It subjects the individual to a fate of ever-increasing fear and distress. He knows not what discriminations may be established against him, what proscriptions may be directed against him, and when and for what cause his existence in his native land may be terminated. He may be subject to banishment, a fate universally decried by civilized people. He is stateless, a condition deplored in the international community of democracies. It is no answer to suggest that all the disastrous consequences of this fate may not be brought to bear on a stateless person. The threat makes the punishment obnoxious.

The civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime. It is true that several countries prescribe expatriation in the event that their nationals engage in conduct in derogation of native allegiance. Even statutes of this sort are generally applicable primarily to naturalized citizens. But use of denationalization as punishment for crime is an entirely different matter. The United Nations' survey of the nationality laws of 84 nations of the world reveals that only two countries, the Philippines and Turkey, impose denationalization as a penalty for desertion. In this country the Eighth Amendment forbids this to be done.

In concluding as we do that the Eighth Amendment forbids Congress to punish by taking away citizenship, we are mindful of the gravity of the issue inevitably raised whenever the constitutionality of an Act of the National Legislature is challenged. No member of the Court believes that in this case the statute before us can be construed to avoid the issue of constitutionality. That issue confronts us, and the task of resolving it is inescapably ours. This requires the exercise of judgment, not the reliance upon personal preferences. Courts must not consider the wisdom of statutes but neither can they sanction as being merely unwise that which the Constitution forbids.

We are oath-bound to defend the Constitution. This obligation requires that congressional enactments be judged by the standards of the Constitution. The Judiciary has the duty of implementing the constitutional safeguards that protect individual rights. When the Government acts to take away the fundamental right of citizenship, the safeguards of the Constitution should be examined with special diligence.

The provisions of the Constitution are not time-worn adages or hollow shibboleths. They are vital, living principles that authorize and limit governmental powers in our nation. They are the rules of government. When the constitutionality of an Act of Congress is challenged in this Court, we must apply those rules. If we do not, the words of the Constitution become little more than good advice.

When it appears that an Act of Congress conflicts with one of these provisions, we have no choice but to enforce the paramount commands of the Constitution. We are sworn to do no less. We cannot push back the limits of the Constitution merely to accommodate challenged legislation. We must apply those limits as the Constitution prescribes them, bearing in mind both the broad scope of legislative discretion and the ultimate responsibility of constitutional adjudication. We do well to approach this task cautiously, as all our predecessors have counseled. But the ordeal of judgment cannot be shirked. In some 81 instances since this Court was established it has determined that congressional action exceeded the bounds of the Constitution. It is so in this case.

The judgment of the Court of Appeals for the Second Circuit is reversed and the cause is remanded to the District Court for appropriate proceedings.

Jurisdiction in Admiralty for airplane death on high seas—applicability to foreign ship or plane

FERNANDEZ v. LINEA AEROPOSTAL VENEZOLANA. 156 F. Supp. 94. U.S. Dist. Ct., S.D.N.Y., Oct. 21, 1951. Dawson, D. J.

Libel in admiralty for death of stewardess on respondent's aircraft which crashed in Atlantic Ocean outside U. S. territorial waters. The first cause of action was based on the Death on the High Seas Act. The court, in upholding the libelant, stated¹ in part (at pp. 95-98):

Respondents deny that this act affords a cause of action under the circumstances set forth in the libel. The Court of Appeals for the Second Circuit has expressly reserved ruling on the question of whether this act grants a right of action for death in the airspace. See Noel v. Linea Aeropostal Venezolana, 2 Cir., 247 F.2d 677. However, the act has been deemed applicable to airplane crashes in a number of cases where the crash occurred over the ocean. Wilson v. Transocean Airlines, D.C.N.D.Cal. 1954, 121 F. Supp. 85; Higa v. Transocean Airlines, D.C.Hawaii 1954, 124 F. Supp. 13; Choy v. Pan-American Airways Co., 1941 A.M.C. 483 (S.D.N.Y. 1941). See also, 55 Colum.L.Rev. 907, n. 56; 41 Cornell L. Rev. 243 at p. 245 (1956).

Respondents do not seek to dismiss the first cause of action on the general ground that the Death on the High Seas Act is not applicable to death resulting from an airplane crash. Rather they contend that the only part of the act applicable is § 4 of the act, 46 U.S.C.A. § 764, which makes recovery contingent upon the right of action granted by the law of the foreign state. Respondents contend that § 1 of the act, 46 U.S.C.A. § 761, does not create a cause of action when death occurs on board a foreign flag ship or plane outside of the territorial waters of the United States, on the ground that under the circumstances only the law of the flag applies. They urge that the only remedy available to a representative of the person whose death occurred on board a foreign ship or plane outside of the territorial waters of the United States is that accorded by the foreign law, and that although an action may be brought in admiralty in this Court, pursuant to § 764 of Title 46, no independent cause of action (not growing out of the rights granted by the foreign law) may be maintained in this Court. This position would mean that no action would lie for wrongful death on the high seas unless death occurred on a plane or vessel which flew the flag of a nation which had by statute granted a cause of action for wrongful death. This would be a harsh rule and would hardly seem consonant with the intent of Congress in adopting the Death on the High Seas Act. If Congress had intended that only the law of the flag was applicable to actions for death on the high seas, then § 4 of the act would be sufficient to preserve such cause of action. But the act as passed preserved not merely rights under foreign law, but also, by § 1 of the act, gave additional right to the personal representative of the deceased to maintain an action against the "vessel, person, or corporation which would

¹ Footnotes omitted.

have been liable if death had not ensued." As the court said in *Wilson v. Transocean Airlines*, *supra*, 121 F.Supp. at page 94: "By these words the statute gives a right of action where none existed before."

Whether Congress had the power to create such a cause of action, or intended to create such a cause of action, where death occurred on a foreign ship or plane on the high seas, has been the subject of much discussion. It is urged that in *Lauritzen v. Larsen*, 1953, 345 U.S. 571, 73 S.Ct. 921, 97 L.Ed. 1254, a case dealing with the application of the Jones Act, 46 U.S.C.A. § 688 to foreign seamen on foreign ships, the Supreme Court held that in the absence of a clear showing of different Congressional intent, such maritime statutes would be considered to apply only to areas and transactions in which American law would be considered operative under prevalent doctrines of international law. However, the Jones Act was, in practical effect, a labor law regulating the rights of seamen; and in the absence of definite legislative intent to the contrary, it would be proper to assume that it was not intended to regulate the rights of foreign seamen on foreign ships. See *O'Neill v. Cunard White Star Lines*, 2 Cir., 1947, 160 F.2d 446, certiorari denied 332 U.S. 773, 68 S.Ct. 56, 92 L.Ed. 358.

But when we are dealing with death acts, such as Lord Campbell's Act, 9 & 10 Vict., c. 93, or the Death on the High Seas Act, we are dealing with a different situation. The courts have held that in the absence of a statute an action could not be maintained for death caused by negligence. See *The Harrisburgh*, 1886, 119 U.S. 199, 7 S. Ct. 140, 30 L.Ed. 358. These cases did not develop from the principle that no right existed, or that no wrong had been done, but rather that whatever cause of action had existed had died with the death of the person injured and could no longer be asserted even by the next of kin or the estate of the deceased victim. To correct this situation death acts have been passed in nearly all jurisdictions. This still left a vacuum in the case of deaths which might result from accidents on the high seas. To allow actions to be maintained for deaths in this situation the Death on the High Seas Act was enacted. See *Hughes*, *Death Actions in Admiralty*, 36 Yale L.J. 115 (1921). While the maintaining of a death action is sometimes loosely referred to as a "substantive right," it is, properly speaking, not a "right" but rather a "power" which removes a previous "disability." See *Fundamental Legal Conceptions as Applied in Judicial Reason*, by Professor Hohfeld, 26 Yale L.J. 710 (1917). The "right" depends on whether a wrong has been committed and this, of course, depends upon where the act was committed. An act in one area may be a wrong, but in another area may not be a wrong. The Death on the High Seas Act recognizes this distinction for it does not create a cause of action or grant a right of recovery for death in every situation but only against those defendants "which would have been liable if death had not ensued." Thus the liability for an accident causing death would be dependent upon the law of the place where the accident happened—and if it happened on a foreign ship it might well be dependent upon the law which would be applicable to that ship. The right of action

for negligence would depend upon the law of the place of the accident, but the "power" to maintain the action would not be dependent upon the locus of the accident but rather upon the forum which exercised that power. In this country the admiralty courts have assumed jurisdiction to the extent that the laws of the country extend that jurisdiction. Thus in *The Buenos Aires*, 2 Cir., 1924, 5 F.2d 425, the Court of Appeals for this Circuit held that under the Death on the High Seas Act a Spanish vessel was liable in action *in rem* for the death of a seaman, even though there was no right of action *in rem* under the Spanish law.

* * * * *

The admiralty law of the United States, as expressed in the Death on the High Seas Act, now grants power to the admiralty courts to entertain an action for a wrong done on the high seas even though the person injured has died as a result of the wrong. This power granted to the courts is applicable even though the wrong occurred in an area not subject to the laws of the United States.

The motion to dismiss the first cause of action is denied. . . .

NOTES

Citizenship—expatriation—"voluntary" service in foreign army—burden of proof

Action for declaration of nationality. The courts below held plaintiff had lost his citizenship under Section 401 (c) of the Nationality Act of 1940 by "voluntary" service in the Japanese army even though he was conscripted. The Supreme Court reversed on the ground that the Government has the burden of proving any act of expatriation by clear evidence. It held, further, that the burden of proof on the "voluntary" nature of service in a foreign army lay with the Government, and that the burden had not been met. Chief Justice Warren delivered the opinion of the court. Justice Black, although concurring in that opinion, wrote a separate concurring opinion in which Justice Douglas joined. Justice Frankfurter, joined by Justice Burton, wrote a separate opinion concurring in the result. Justice Harlan, joined by Justice Clark, dissented in an opinion. *Mitsugi Nishikawa v. Dulles*, 356 U.S. 129 (U.S. Supreme Court, March 31, 1958).

Treaties—interpretation—directory provision

In *United States v. Morris*, 252 F.2d 643 (U.S.Ct.A., 5th Circuit, Feb. 25, 1958, John R. Brown, Ct.J.), a requirement under Article 30 (d) of the Migrant Labor Agreement of 1951,¹ as amended, between the United States and Mexico, that joint determination of complaints of violation ". . . shall be completed not later than ten days . . ." was construed as directory and not mandatory.

¹ T.I.A.S., No. 2331, as amended by T.I.A.S., Nos. 2531, 2586, 2928, 3454, and 3609.

Full faith and credit—foreign judgments—enforceability of decree as to future installments

In a proceeding to register in Illinois a Missouri decree for divorce, alimony, and support, under the Uniform Enforcement of Foreign Judgments Act,¹ the plaintiff wife argued, on cross appeal, that the Missouri decree was also entitled to registration with respect to future payments for support and alimony. The court held that both policy reasons and the language of the Constitutional provision and implementing statute entitled the decree to full faith and credit for future payments. *Light v. Light*, 12 Ill. 2d 502 (Dec. 18, 1957, rehearing denied Jan. 23, 1958, Schaefer, J.).

Blocked account—vesting—suit for possession

Attorney General brought suit for possession of an account in defendant bank. The account had been blocked and a license had been issued to intervenors. Subsequently, the account was vested. The bank had resisted turning over the account to intervenors in a separate suit, and now seeks by summary judgment its expenses in protecting the account. The court held that under the International Claims Settlement Act of 1949, as amended,² the Attorney General was entitled to possession, and claims for expenses could not be made in a proceeding for possession. Similarly, intervenors had no remedy in such a proceeding. *Brownell v. New York Trust Company*, 159 F. Supp. 95 (U.S. Dist. Ct., S.D.N.Y., Feb. 11, 1958, Kaufman, D.J.).

Freezing order—"nationals" within Executive Order

American corporations which had been convicted of conspiracy to violate the Foreign Agents Registration Act³ were held to be "nationals" of Germany within the meaning of the freezing order, Executive Order 8389,⁴ issued pursuant to Section 5(b) of the Trading with the Enemy Act.⁵ *Dix v. Brownell*, 159 F. Supp. 163 (U.S. Dist. Ct., E.D.N.Y., Feb. 19, 1958, Rayfiel, D.J.).

Foreign corporation—validity of service on managing director

On motion to quash service on the managing director of a German corporation, who was personally served while attending a convention in New Jersey, it was held that the evidence established a *prima facie* case for upholding the service, inasmuch as the managing director was also majority stockholder of a New Jersey corporation formed to act as the German corporation's sales and repair agency in the United States. *Alfred Hofmann & Co. v. Karl Meyer Erste H., Etc.*, 159 F.Supp. 77 (U.S. Dist. Ct., D.N.J., Feb. 21, 1958, Hartshorne, D.J.).

¹ Ill. Rev. Stat. 1957, Chap. 77, pp. 88-105.

² 69 Stat. 562.

⁴ 12 U.S.C.A. § 895a note.

³ 22 U.S.C.A. § 611 *et seq.*

⁵ 50 U.S.C.A. Appendix.

Conflict of laws—express choice of law upheld

This was a suit by an assignee who had subsequently assigned his rights under a surplus property contract. The original contract and the assignments were made in Belgium. The original contract provided that the contract "shall be governed by and construed in accordance with the law now prevailing in the District of Columbia, United States of America." It was held the law intended by the parties should govern. *Overseas Trading Company, S.A. v. United States*, 159 F. Supp. 382 (Ct. Claims, March 5, 1958, Jones, C.J.).

Capacity to sue—statute of limitations

The capacity to sue of the President of the National Hungarian Government in exile was stated to be defective either as a sovereign, since he was not recognized, or as an individual, and his standing in a representative capacity was doubtful. However, the suit was dismissed on the ground that the statute of limitations had run, whether the action was for breach of contract or for conversion. Any trust theory had been overruled in an earlier phase of the case. *Varga v. Credit-Suisse*, 171 N.Y.S. 2d 674 (N.Y., Sup. Ct., App. Div., 1st Dept., March 18, 1958, Rabin, J.). The case below was noted in 51 A.J.I.L. 819 (1957).

Suit on foreign award—merger in judgment

In a suit upon an English award which had been reduced to judgment in the English courts, it was held that the doctrine of merger did not apply to judgments of foreign countries, even though by the domestic law of England and New York the award would merge in the judgment. *Oil-cakes & O. Tr. Co. v. Sinason Teicher I.A.G. Corp.*, 170 N.Y.S. 2d 378 (Sup. Ct., Spec. Term, N.Y. City, Part I, Feb. 4, 1958, Markowitz, J.).

Status of Forces—waiver of jurisdiction—effect as bar to mixed civil-criminal action in French courts

An American officer was charged with involuntary homicide in an off-duty motor accident in a mixed civil-criminal action instituted by the widow of the Canadian officer who was killed. The Court of Appeal of Paris had upheld the sentence imposed for the offense. The French authorities had previously waived jurisdiction in the case pursuant to Article VII (3) (c) of the N.A.T.O. Status of Forces Agreement. It was argued in support of the judgment of the Court of Appeal that the waiver was not effective as a bar unless the sending state had actually exercised its jurisdiction. The Court of Cassation quashed the judgment of the Court of Appeal on the ground that the waiver operated as a bar to prosecution in the criminal courts of the receiving state unless the sending state expressly waived the jurisdiction it acquired by the original waiver, and that the judgment below violated, *inter alia*, the Status of Forces

Agreement. *Case of Whitley* (*Aitchison v. Whitley*, Court of Cassation, Criminal Chamber, 1958).¹

Status of Forces—acts in performance of official duty—primary jurisdiction of sending state

An American serviceman driving his automobile from his home to his duty station hit and killed a pedestrian. In criminal proceedings in the Italian courts, the U.S. military authorities contested the jurisdiction, claiming primary jurisdiction for an act in the performance of official duty under Article VII (3) (a) (ii) of the N.A.T.O. Status of Forces Agreement. The court sustained the defense, stating, *inter alia*, the provision covered everything directly or indirectly connected with the duties performed, that the sending state must make the determination in borderline cases, and that the provision should be broadly construed. *Case of Kelley* (Naples Court, 5th Criminal Section, Nov. 27, 1957).

NOTE: In a similar case, the same result was reached. *Case of Fultz* (Udine, Nov. 8, 1957).

RECENT SIGNIFICANT GERMAN DECISIONS *

Jurisdiction of courts—damage claim against Joint Export-Import Agency—Allied High Commission Law No. 13, Art. 2—Convention on the Settlement of Matters Arising out of the War and the Occupation

Defendant owed the Joint Export-Import Agency an amount of money for transportation, which the Agency had assigned to plaintiff, a private company owned by the Federal Government. Defendant claimed a set-off on the following facts: The Joint Export-Import Agency was instrumental in bringing about an important complex of import and export contracts between a German and a Danish firm in 1947. The import contracts were performed, but the Danish firm refused to take delivery of the goods to be exported. Defendant claimed that the resulting loss was caused by the Agency's arbitrary and unlawful cancellation of the export contracts, and that it was liable to defendant for damages. The Joint Export-Import Agency denied liability, arguing that it did not cancel the export contracts, but when it found that the Danish firm was unable to open the required credit, it gave the necessary administrative instructions to the Economic Administration to dispose of the goods in some other manner.

The Supreme Court held that the Agency was an occupation authority and as such was not and is not subject to the jurisdiction of German courts (Allied High Commission Law No. 13, Article 1a; Convention on the Settlement of Matters Arising out of the War and the Occupation, Chapter I, Article 3, paragraph 2). Although its assignee is subject to German

¹ Material made available for this and the following note through the courtesy of the Office of the Judge Advocate General of the Army.

* Prepared by M. Magdalena Schoch, U. S. Department of Justice, Washington, D. C.

jurisdiction, the claim itself is such that it cannot be the basis of a suit in a German court. It is immaterial exactly what the Agency did in this matter and whether or not it acted in violation of its official duties, for it acted in the exercise of its governmental authority in the control of German foreign trade. Other than in the case reported in Vol. 17, p. 317 [52 A.J.I.L. 543 (1958)], the Joint Export-Import Agency was not a party to the contract and its activity was not governed by private law, hence it cannot be charged with a breach of contract. Article 3, paragraph 2, Chapter I, of the Convention on Settlement expressly provides that, with certain exceptions not applicable here,

German courts and authorities shall have no jurisdiction in any criminal or non-criminal proceedings relating to an act or omission which occurred before the date of entry into force of the present Convention, if immediately prior to such date German courts and authorities were without jurisdiction with respect to such act or omission, whether *ratione materiae* or *ratione personae*.

Prior to the Convention the acts or omissions of occupation authorities were declared exempt from German jurisdiction by Article 2 of High Commission Law No. 13. The Agency did not submit to German jurisdiction in the matter of the set-off. Nor did the Federal Republic assume liability for such claims when the assets of the Agency were transferred to it (Convention on Settlement, Chapter IX, Article 4); on the contrary, it expressly declined liability in the exchange of letters with the High Commissioner of May 19 and 21 (Appendix 18 a, paragraph 1). Federal Supreme Court, 1st Civ. Div., Jan. 10, 1956 (I ZR 44/54). 19 *Entscheidungen des Bundesgerichtshofes in Zivilsachen* 341.

Paris Convention on the Settlement of Matters Arising out of the War and the Occupation—Allied High Commission Law No. 63—German foreign assets

The defendant, Algemene Kunstzijde Unie V.N., is a corporation established under Netherlands law with headquarters in The Netherlands. In 1929 it entered into a working agreement with the West German "Vereinigte Glanzstoff-Fabriken AG" (VGF). At that time almost all the shares of the VGF were exchanged for shares of the defendant. The latter is holding the largest portion of the VGF stock to this day. In addition, the defendant also participates in other West German corporations. Before the collapse, the participation of German stockholders in the defendant corporation amounted to approximately 30%. Partly before the last world war and partly during that war, the plaintiffs, German residents, had acquired bearer shares of the defendant or deposit certificates for such stock at a face value of a total of 20,000 Dutch florins, and deposited most of the respective documents in Germany, some of them, however, with a German bank in The Netherlands. In connection with the seizure of German property in foreign countries effected during the second World War, Article 3 of the Netherlands Decree on Enemy Property of October

20, 1944, provided that property which belonged to an enemy state or an enemy national was legally vested in The Netherlands Government as of the effective date of that Decree. After Germany had been occupied, the stock of the defendant and the respective certificates located in the Western Zone of occupation were delivered to the Land Central Bank pursuant to Article 2 of Military Government Law No. 53, and later they were turned over to The Netherlands Government by the occupation authorities. The Netherlands Government transferred to the defendant a portion of the stock formerly owned by Germans.

Both courts below dismissed the action, the Court of Appeals holding the action to be inadmissible according to Article 3 of Allied High Commission Law No. 63, on the ground that the disputed stockholders' rights of the plaintiffs had been located in Holland and had been expropriated there in their entirety, and therefore the provisions of Article 1, Subsection 1, of Law No. 63 were applicable. Plaintiff's final appeal was unsuccessful.

The Federal Supreme Court held that the legal situation which was decisive for the exclusion of German jurisdiction in cases of this kind has undergone a change since the publication of the decision of the Court of Appeals, inasmuch as a new ground for the exclusion of German jurisdiction was provided for in Article 3, paragraph 3, Chapter 6, of the Paris Convention, which became effective on May 5, 1955 (Federal Law Gazette II, page 405, at 440)—a provision which is independent of the continued effectiveness of Law No. 63, confirmed in Article 2, Chapter 6, of that Convention. This new legal situation must also be taken into consideration in this final appeal for the simple reason that jurisdiction is one of the general prerequisites of a lawsuit which are to be reviewed by the court of final appeal according to the law in effect at the time when it renders its decision. The Supreme Court then explained that the said provision of the Paris Convention excludes German jurisdiction to a larger extent than does Law No. 63. The applicability of the latter depended on the fact that the vested asset which had been German-owned was *located in a foreign country*. Article 3 of Chapter 6 of the Paris Convention is no longer predicated upon this factor (with the exception of the German property in Austria). Rather, in paragraph 1 of that provision, the Federal Republic waived all objections to measures

which have been, or will be, carried out with regard to *German external assets or other property, seized for the purpose of reparation*

or the other purposes listed therein. Paragraph 3 of this article provides that in these cases "no claim or action shall be admissible." Therefore, Article 3 of Chapter 6 of the Paris Convention also covers—with the exception of the measures against German assets in Austria, for which special provisions are made in paragraph 2—measures of the said type against German assets which were not or are not located in foreign countries but in Germany itself. Accordingly, the only prerequisite left for the exclusion of German jurisdiction is the fact that the claim asserted in the lawsuit refers to an asset which was seized for purposes of reparations or

some other purpose such as is listed in paragraph 1 of Article 3, Chapter 6, of the Paris Convention. Since it is not disputed here that the expropriations of German property effected by the Netherlands Decree of October 20, 1944, were carried out for purposes of reparations, the decision as to the admissibility of the action depends therefore only on the question whether the stockholders' rights in dispute are to be considered expropriated by that Netherlands Decree in the limited extent claimed by the plaintiffs. For the decision of this question, only the laws of the expropriating country, *i.e.*, The Netherlands, can be relevant. This is made clear explicitly in Article 1, subsection 1(a), of Law No. 63, and also applies in the same manner to Article 3, Chapter 6, of the Paris Convention. According to Article 3, Chapter 6, the location of the expropriated assets is significant—if at all—only for the decision as to the extent of the foreign expropriation, which decision must be made in accordance with the law of the expropriating state. Consequently, the question of the location of an asset must likewise be decided according to that foreign law. This opinion is not in contradiction with the decision of this Court of March 24, 1955. [See 52 A.J.I.L. 540 (1958).] That decision, it is true, holds that, when applying *Law No. 63*, the court must decide the question whether the seized asset was located in a foreign country, in accordance with German law and the rules of private international law forming part of it, because *Law No. 63* left the German courts the possibility to examine, in accordance with German law, whether this prerequisite for the applicability of *Law No. 63* existed. Concerning Article 3 of Chapter 6 of the Paris Convention, which is now to be applied here, the legal situation is different; for in contrast to Article 1 of *Law No. 63*, this provision of the Convention is not predicated upon the location of the seized asset in a foreign country and therefore no longer offers a possibility to re-examine this question according to German law.

Therefore the Court of Appeals gave proper consideration to the legal situation established by the Paris Convention when it examined in accordance with Netherlands law the question (which is also important for the application of *Law No. 63*, on which that court based its decision) whether the stockholders' rights claimed by plaintiffs for themselves were expropriated by The Netherlands. The court reached the conclusion that according to Netherlands law the stockholders' rights of the plaintiffs were seized *in toto*, and the proposition was untenable that the stockholders' rights in defendant's assets located in Germany were not affected by the expropriation and were thus "split off" from their rights in the Netherlands assets.

Since this conclusion is based exclusively on the contents and effect of the law of The Netherlands, *i.e.*, foreign law, it is not subject to review by this court and is binding on it. Nor is the situation changed by plaintiffs' argument that this result violates the principle of territoriality which is generally recognized in international law and therefore also applies in Netherlands as well as German law; for the concordance which exists in that respect between Netherlands law and German law (which latter is subject to review by the court of last resort) does not alter the

fact that here Netherlands law applies and, being foreign law, cannot be reviewed by the court. It would be different only if the argument could be made that The Netherlands law which the Court of Appeals applied, was contrary to German public policy. However, neither Article 3, Chapter 6, of the Paris Convention nor Law No. 63 permits this argument (Federal Supreme Court in Civil Matters, Volume 8, page 378, at 379).

Since, accordingly, the court must hold that the prerequisites of Article 3 of Chapter 6 of the Paris Convention are present here, the action is inadmissible under paragraph 3 of that article. Therefore, the decisions below must be upheld. Federal Supreme Court, Dec. 13, 1956 (II ZR 86/54) (AKU-Fall). 10 *Neue Juristische Wochenschrift* 217 (2) (No. 6, 1957).

London Agreement on German External Debts—income from rents collected by an agent—informal declaration of participation

Plaintiff, a citizen and resident of the United States, owns real estate in Berlin. She employed defendant as an agent to manage the property and collect the rents; he paid the rents, after covering expenses, into a separate bank account in his name. On June 20, 1941, he paid RM 9,000 to the Conversion Office for Foreign Debts; plaintiff did not receive this amount. In 1954 she demanded payment of an amount of DM 900 plus interest under the London Debt Agreement of 1953 and the Implementing Law of August 24, 1953.

The Federal Supreme Court ordered defendant to pay accordingly, holding that the defendant was under a contractual obligation to transmit the profits from the real estate to the plaintiff. By paying the amount of RM 9,000 to the Conversion Office he was released of his obligation to that extent under the German legislation then in effect (Law concerning Foreign Monetary Obligations of June 9, 1933, RGB1. I, 349). But if plaintiff's claim falls under the London Debt Agreement, a new obligation has arisen for the debtor. Among the debts to be settled by the Agreements are "pecuniary obligations arising out of contracts other than loan or credit contracts and due before 8th May, 1945" (Article 4 (1) (c)). This broad definition covers the claim here, but the claim also comes under the special category of "income from investments—rents" in Annex IV, Article 3, paragraph 2 (3). While plaintiff has no claim against defendant under a contract of lease, she has a claim for the rents under the agency contract. The wording of this provision permits rents collected by a manager to be considered as "income from investments" for purposes of the Agreement.

A creditor is entitled to the benefits of the Agreement only if he has accepted settlement thereunder (Article 15), which must be declared in writing (Annex IV, Article 14, paragraph 1). Such a declaration of participation is an offer to conclude an agreement for settlement according to the Agreement. If the debtor does not accept the offer, the creditor may enforce settlement in the ordinary German courts (Article 15, paragraph 1; Article 17 of the Agreement; Articles 14 and 15 of Annex LV;

section 3 of the Implementing Law). The creditor must also declare his assent to the establishment by German courts of terms of payment and other conditions in accordance with the Agreement (Article 17, paragraph 1 (a)). These requirements were complied with by plaintiff. It is not necessary that the required declarations be made prior to the bringing of the suit nor that they be contained in a separate document; it is sufficient that they are stated in the complaint, as was the case here. Federal Supreme Court, 7th Civ. Div., May 23, 1957 (VII ZR 237/66). 10 *Neue Juristische Wochenschrift* 1359 (6) (No. 37, 1957).

*Human Rights Convention—judgment to be pronounced publicly—
German procedural rules permitting notification in writing*

A party in a civil proceeding attacked the decision of the intermediate appellate court on the ground that the court had not announced the decision at a public hearing and thereby violated Article 6, paragraph 1, of the Convention for the Protection of Human Rights and Fundamental Freedoms (signed at Rome, November 4, 1950, BGBI. 1952, II, 686). That provision states that, in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. "Judgment shall be pronounced publicly," but the press and public may be excluded on defined grounds. Section 310 of the German Code of Civil Procedure provides that judgment shall be pronounced upon termination of the oral hearing or at a hearing to be set within a week. Where there is no oral hearing according to section 128, paragraph 2, service of the tenor of the judgment on the parties shall be substituted for oral pronouncement. Section 128 reads: "(1) The parties shall argue the dispute in an oral hearing before the competent court. (2) With the consent of the parties the court may render a decision without an oral hearing." The Supreme Court held that these provisions do not violate the Convention. It stated that

the clause in Art. 6 para. 1 concerning oral pronouncement of the decision must not be considered by itself but must rather be examined in the context of the first sentence of Art. 6 para. 1, to which it is tied, and must be interpreted in the light of the objectives of the Convention. . . . As appears from Article 1 of the Convention, its purpose is to guarantee the "rights and privileges" laid down in Part I of the Convention. Among these rights is, according to Art. 6 para. 1, first sentence, the "right to a fair and public hearing within a reasonable time. . . ." A public hearing, however, is not absolutely required but may be replaced by some other proceeding if such other proceeding takes the interests of the parties into account in a "fair" manner. . . . The rule laid down in Art. 6 para., 1 proceeds on the assumption that an oral hearing takes place; that follows mainly from the fact that it speaks of the exclusion of the public and the press "from all or part of the trial." Thus the rule concerning public pronouncement of the judgment is likewise predicated on the existence of a public hearing. Where, however, the parties are at liberty to waive a public hearing and to reach the decision sought by them in a different but

"fair" manner, the basis for the requirement of a public pronouncement of the decision is removed.

Federal Supreme Court, 3rd Civ. Div., June 27, 1957 (III ZR 51/56). 10 *Neue Juristische Wochenschrift* 1480 (7) (No. 40, 1957).

Laws enacted by occupying Powers—application in State administrative courts reviewable by the Federal Administrative Court

The Federal Administrative Court has jurisdiction, *inter alia*, to review decisions of the administrative courts of the States. An appeal from a State administrative court "may be based only on the ground that the final decision appealed from rests upon non-application or erroneous application of Federal law" or, in appeals from a supreme State administrative court, on grounds of serious procedural defects (section 56, paragraph 1 of the Law concerning the Federal Administrative Court, of September 23, 1952, BGBI. I, 625). The question arose (in a case the facts of which are not reported) whether the term "Federal law" includes laws enacted by the occupying Powers which remained in effect after Germany regained sovereignty. The law cited above is silent on the point.

The Full Bench of the Federal Administrative Court held that "Federal law" in section 56 is contrasted with State and local law. The intent and purpose of the Law is to see to it that administrative courts give uniform application to all laws that are not exempted from Federal jurisdiction by reason of the federal structure of the Constitution. Hence occupation law must be treated in the same manner as Federal law. This result is not incompatible with the decisions of the Federal Constitutional Court (1BVerfGE 10; 2 *id.* 181) which held that the Federal Constitutional Court had no jurisdiction to review occupation laws as to their constitutionality. Resolution of the Full Bench of the Federal Administrative Court, Nov. 14, 1955 (BVerwG Gr. Sen. 1 55, BVerwG V C 18.54). 2 *Entscheidungen des Bundesverwaltungsgerichts* 319.

Bill of exchange to be presented "three months after conclusion of peace"—interpretation with regard to Great Britain

Plaintiff, as holder of a bill of exchange made in 1940, sued defendant bank as guarantor. The parties had agreed that the bill was to be presented for payment not earlier than "three months after the conclusion of peace." The transaction underlying the bill was a so-called "transaction to safeguard claims in foreign exchange," a procedure which the Reichsbank sponsored during the second World War in order to diminish the exchange risks of German importers and exporters. It was a sort of clearing procedure, in which the Reichsbank brought together importers who owed debts on merchandise to enemy parties in foreign currency, and exporters who had accounts receivable in foreign currency which they could not collect due to the war. The importer could buy the exporter's accounts receivable against payment of Reichsmarks at an agreed rate of exchange; the exporter obligated himself to deliver to the importer the

amounts in foreign currency which he had sold to him, "upon conclusion of peace," and at the latest, three months after that date. If at the expiration of that time the transaction could not be carried out, then the importer had to resell the foreign exchange to the exporter. In order to secure the rights of the importer, the exporter had to accept a bill of exchange made by the importer and have it guaranteed by a bank. The transaction in this case was entered into by a German import firm which owed English pounds to an English supplier, and a German export firm which had pound claims against an English firm.

The Federal Supreme Court, after having disposed of questions of German law on bills of exchange, held that the bill had fallen due on August 5, 1955, three months after the effective date of the Convention on the Settlement of Matters Arising out of the War and the Occupation, which was May 5, 1955 (see Announcement by the Federal Chancellor, of May 5, 1955, BGBI. 1955, II, 628). This was the date which, for the purpose of interpreting the clause "three months after the conclusion of peace," must be regarded as the date when the status of transactions such as were involved here was finally determined. The London Agreement on German External Debts provided only for a settlement of German pre-war foreign debts, but did not concern German foreign assets. It was the Paris Convention that made it clear that the transaction could not be carried out, *i.e.*, that the importer could not collect on the English claims (Chapter 6, Articles 3, 4, 5). Federal Supreme Court, 2nd Civ. Div., Nov. 15, 1956 (II ZR 163/56). 22 *Entscheidungen des Bundesgerichtshofes in Zivilsachen* 148.

Citizenship—persons of German ethnic origin (Volksdeutsche)—service in the Waffen-SS—Article 116, Basic Law—Law to Settle Questions of Citizenship of February 22, 1955

The jurisdiction of the German court in a divorce proceeding depended on the German citizenship of the plaintiff husband. Both parties at the time of marriage were so-called *Volksdeutsche* (ethnic Germans), born in Rumania; at the time suit was brought, the husband lived in Germany as an expellee; the wife, whose Rumanian citizenship was beyond doubt, lived in Rumania. The husband had served in the Waffen-SS at the time of the marriage. He claimed German citizenship on that ground and by virtue of Article 116 of the Basic Law, which provides:

Unless otherwise provided by law, a German within the meaning of this Basic Law is a person who possesses German citizenship or who has been accepted in the territory of the German Reich, as it existed on 31 December 1937, as a refugee or expellee of German ethnic origin or as the spouse of such person. (Par. 1.)

The Supreme Court held that Section 10 of the Law to Settle Questions of Citizenship of February 22, 1955 (BGBI. I, 65) expressly clarifies that service in the Waffen-SS did not automatically bestow German citizenship. Nor did the plaintiff obtain citizenship by any official act. Whether he

is a "German" in the meaning of Article 116, paragraph 1, of the Basic Law is immaterial. This provision, while giving certain persons the same rights as were granted to German citizens, did not confer citizenship on them; in particular they did not obtain the status of German citizens for purposes of private international law. This question was highly controversial, but it has been clarified by the Law of February 22, 1955, which provides that persons who are "Germans" in the meaning of the Basic Law without having German citizenship have a right to be naturalized upon their application, unless they are dangerous to German security (section 6). Since plaintiff has not applied for German citizenship and has lost his Rumanian citizenship, he is a stateless person. Federal Supreme Court, 4th Civ. Div., Oct. 17, 1956 (IV ZR 182/55). 10 *Neue Juristische Wochenschrift* 100 (5) (No. 3, 1957).

Contingent fee agreement made by American attorney enforceable in German courts—application of American law not violative of German public policy.

Plaintiff, an attorney in the District of Columbia, sued the State of Bavaria for the contingent fee agreed upon for legal services rendered in connection with the application of the Military Government Currency Conversion Law to credit balances of the Dachau concentration camp. The fee was to be 1½ percent of the amount obtained, regardless of whether or not the outcome was due to the attorney's efforts. After successful conclusion of the matter the client made a part payment but refused to pay the full amount of the percentage on the ground that a contingent fee agreement violated German public policy, especially if the fee was made independent of the attorney's activities. Plaintiff was successful in the lower courts, and the Federal Supreme Court affirmed, holding that the agreement was governed by the law of the District of Columbia, which permits contingent fee agreements. In Germany contingent fees were always regarded as professionally unethical, and they were held immoral by the Supreme Court in cases presenting aggravating circumstances, among which was the waiving of causality between the result obtained and the attorney's efforts. A Decree on Attorneys' Fees of 1944 declared contingent fee agreements ineffective, and Federal legislation in 1950 adopted the rule, which is also found in the draft of a Federal Code for Attorneys. England and France take the same attitude. Other countries, among them the majority of the States of the United States, regard them permissible. A German attorney is an officer of the court, and therefore his fee agreements must be measured by a stricter standard than those of a business man. This stricter standard does not apply to a foreign attorney. Under the facts of this case it cannot be said that the application of the foreign law rule would be *contra bonos mores* or violative of the purpose of a German law in the meaning of Article 30 of the Introductory Law to the Civil Code. Federal Supreme Court, 7th Civ. Div., Nov. 15, 1956 (VII ZR 249/56). 22 *Entscheidungen des Bundesgerichtshofes in Zivilsachen* 162.

Extradition—right of asylum of political persecutees—temporary injunction

The competent Court of Appeals had ordered the extradition of a person to Yugoslavia, upon a request of the Yugoslav Government, which charged the person with having committed in Yugoslavia criminal acts which were regarded as ordinary crimes under the law of Yugoslavia as well as of Germany. The party claimed that he was an enemy of the Tito regime and would therefore be in danger of his life if sent back to Yugoslavia. He relied on Article 16, paragraph 2, of the Basic Law, which guarantees the right of asylum to political persecutees. Pending the examination of the question of political persecution, the court issued a temporary injunction preventing the Federal Government from carrying out the extradition order. Federal Constitutional Court, 1st Div., May 14, 1957 (1 BvB 193/57). 6 *Entscheidungen des Bundesverfassungsgerichts* 443.

Betrayal of military secrets of the foreign forces in Germany—Foreign Forces Convention—applicability of German criminal law—jurisdiction of German court

The accused, a foreign national, had been found guilty by a German court of having revealed in a foreign country secrets of the foreign forces in Germany, which had been entrusted in part to agencies of the Federal Government. The Supreme Court of Bavaria upheld the conviction on these grounds:

1. Such secrets are not only secrets of the foreign forces but at the same time also state secrets of the Federal Republic (a) if the subject matter affects, directly or indirectly, the general welfare of the Federal Republic and thus secrecy is in the interest of the Federal Republic as well; and (b) if in addition such secrets were entrusted to authorities of the Federal Republic and such authorities had the duty and the intention to safeguard the secrets in the German interest.

The Federal Supreme Court has so held with regard to secrets of the former occupying Powers and their armed forces (e.g. 6 *Decisions of the Federal Supreme Court in Criminal Matters* 333). These principles apply likewise to the military secrets of the foreign forces as defined in Annex A, Title I, section 1, of the Convention on the Rights and Obligations of Foreign Forces and their Members in the Federal Republic (effective since May 5, 1955). There exists no reason why military secrets of the foreign forces, which were entrusted to the appropriate authorities of the Federal Republic in the framework of the expressly contemplated co-operation (Article 4 of the Foreign Forces Convention) and thus became German state secrets, should be protected exclusively by the penal provisions of the Convention (Appendix A) and not additionally by those of the German Criminal Code (Section 73 of the German Criminal Code provides that where one act violates several penal laws that law shall be applied which provides for the most severe punishment).

2. The German court had jurisdiction over the criminal act because it

was at least partially committed in Germany. Section 2, paragraph 3, of the Criminal Code provides that an act is committed in each place where the defendant acted or where the result of his act occurred. The result here, *inter alia*, was that the betrayal abroad of military secrets of the foreign forces endangered the security of the Three Powers or their forces within Germany. Bavarian Supreme State Court, May 9, 1957 (3 St. 18/57). 10 *Neue Juristische Wochenschrift* 1327 (No. 21, 1957).

Judgments of courts of occupying Powers—Convention on the Settlement of Matters Arising out of the War and the Occupation—double jeopardy

In 1947 a woman doctor was found guilty by Military Court No. 1 at Nürnberg of having participated in medical experiments on inmates of a concentration camp, as a result of which many victims died. She was sentenced to 20 years' imprisonment for war crimes and crimes against humanity. In 1951 the American High Commissioner reduced the sentence to 10 years. In 1952 the prisoner was released for good conduct. Some time thereafter a German criminal proceeding was instituted against her, charging her with the malicious killing of several inmates of the concentration camp by means of injections. Upon her protest the competent criminal court quashed the investigation, and the Court of Appeals affirmed. The court of first instance ruled that double jeopardy exists only where the accused was tried for the same offense by a *German* court. Military Court No. 1 exercised German criminal jurisdiction during the occupation, when German sovereignty continued to exist but its exercise was temporarily entrusted to the occupying Powers; consequently the accused had been tried by a German court and could not be tried again.

The Court of Appeals reached the same result but disapproved of the lower court's theory. It relied on a decision of the Supreme Federal Court (6 BGH St. 176; 7 *Neue Juristische Wochenschrift* 1252 (1954)), which held that courts of the occupying Powers did not exercise German sovereignty but were "foreign courts" for purposes of German criminal law.¹ The Court of Appeals, in its decision, held that, in the Convention on the Settlement of Matters Arising out of the War and Occupation, the then occupying Powers founded their governmental acts on their own national law (*e.g.* Art. 2, par. 1). The finality of foreign judgments may, however, be recognized by an international treaty. The Convention on the Settlement of Matters Arising out of the War and Occupation is such a treaty. It has become internal law by the consent of Parliament and ratification as of May 5, 1955. It provides in Article 7, paragraph 1, that

all judgments and decisions in criminal matters heretofore or hereafter rendered in Germany by any tribunal or judicial authority of the Three Powers or any of them shall remain final and valid for all

¹ Consequently the Supreme Court permitted a criminal prosecution on the same facts on which the defendant had been acquitted by an occupation court.

purposes under German law and shall be treated as such by German courts and authorities.

This does not mean, as has been argued, that the judgments of the occupation courts should retain the effect which they had prior to the Convention, i.e. that of foreign judgments, but rather that henceforth they were to have the same finality and validity as the judgments of German courts. Consequently, an offense which has been the subject of a final judgment of an occupation court cannot be prosecuted again in a German court, according to the rule against double jeopardy enunciated in Article 3, paragraph 3, of the Constitution. The decision of the Supreme Court cited above does not stand in the way of this result, since that decision was rendered prior to the effective date of the Convention.

The Court of Appeals then affirmed, upon a detailed review of the facts, that the facts on which the doctor had been convicted by the Military Court were identical with those of the charge here. That they were categorized as crimes against humanity by the Military Court, whereas the German proceeding defined them as crimes against individual lives, does not make any difference. Order of the Court of Appeals of Schleswig, Sept. 5, 1957 (Ws 101/57). 11 *Neue Juristische Wochenschrift* 112 (No. 23, 1958).

BOOK REVIEWS AND NOTES

Scritti di Diritto Internazionale Pubblico. By Dionisio Anzilotti. Volume II, Tome 1. Padova: Cedam, 1956, pp. 729. L.6,000.

Dionisio Anzilotti was born in Pescia, Tuscany, in 1867 and died there in 1950. His long and active life was entirely dedicated to international law; he was a teacher in various Italian universities, finally in Rome from 1911 to 1937, a prolific writer of books and articles, and a judge, from 1921 until its dissolution, of the Permanent Court of International Justice, over which he presided from 1928 to 1930. Anzilotti, together with Triepel, was the leading representative of the so-called positive school of international law in Continental Europe during the first half of this century. Until recently his books had been out of print for many years and his articles lay buried in various law reviews, most of them in the Italian *Rivista di Diritto Internazionale*, of which he was one of the founders in 1906. We must be grateful, therefore, to the *Società Italiana per l'Organizzazione Internazionale* for having undertaken to collect and reissue Anzilotti's works. The *Course on International Law*, which constitutes the final statement of his basic doctrines in the field, was published as the first volume of Anzilotti's collected works in 1955. The second volume, which includes his other writings on public international law, consists of two tomes: the first one is now being reviewed; the second will soon be published. Two more volumes, containing Anzilotti's writings on private international law (conflict of laws), will complete the work.

Of the writings collected in the tome under review, two, dealing with the "General Theory of State Liability in International Law" (1902) and with "International Law in Municipal Courts" (1905), respectively, were originally issued in book form; the others are articles published in Italian legal periodicals, with the exception of one that was published in the French *Revue Générale de Droit International*. Some of the articles deal with subjects of a general and rather theoretical nature, while others consider specific problems of a practical nature, *e.g.*, whether the Kingdom of Italy, proclaimed in 1861, was a new state or the continuation of the former Kingdom of Sardinia, the effect on boundary lines of a change in the course of a boundary river, and the international status of territorial bays.

All the works collected in the tome relate to the early period of Anzilotti's writing, between 1902 and 1917. While some of the views then expounded by Anzilotti failed to win acceptance (for instance, his view that the Kingdom of Italy was a new state), several attained wide recognition both in Italy and abroad. In dealing with state liability, for instance, he proceeds on the assumption that states, not individuals, are the subjects of international law in the present historical phase; hence there may not be international liability of a state toward an individual, and by the same token an

individual, not being a subject of international law, may not be held to be internationally liable; therefore, in the case of an international tort, international liability may be only the liability of the state to which the tortfeasor belongs towards the state to which the victim belongs. This theory, that the late Professor Borchard was later to expound in this country, is still widely accepted. With regard to constitutional restrictions on treaty-making power, Anzilotti thought, consistently with the view still prevailing, that disregard of such restrictions does not affect, as a rule, the binding force of a treaty from the viewpoint of international law.

On the other hand, a comparison between some of the writings in the volume and Anzilotti's subsequent works show a substantial change in his thinking through the years; thus, with regard to the relationship between international law and municipal law, Anzilotti maintained at the time that international law as such might be directly enforced by a state court under certain circumstances; this view he was later to repudiate in favor of the theory of the absolute distinction and complete separation between international law and municipal law (the so-called "dualistic theory").

Although the present interest of some of the collected works is somewhat dimmed by the passage of time, by the subsequent developments of international law, and to some extent by the very fact that some of the then novel doctrines of Anzilotti are now generally accepted, the importance of the writings is more than historical. Not only do they attest to the extraordinary vigor of Anzilotti's thinking and to his seldom exceeded mastery of the theory and practice of international law, but they still constitute indispensable reading for all those who are interested in a systematic study of the basic doctrines of international law.

ANGELO PIERO SERENI

The Basis of Obligation in International Law and Other Papers. By the late James Leslie Brierly. Selected and edited by Sir Hersch Lauterpacht and C.H.M. Waldock. New York and London: Oxford University Press, 1958. pp. xxxvi, 387. Index. \$8.00; 50s.

Here is a book, a collection of essays and addresses, full of political wisdom and practical statesmanship. Some of them are dated, *i.e.*, they deal with problems of international law that have now been fundamentally changed by the circumstances of the time. Others are as applicable today as when they were written or delivered, but all are marked by the impress of a constructive mind, seeking always to find a solution for the concrete problems of international intercourse.

What was it that characterized all that Professor Brierly wrote, from his inaugural lecture before the University of Oxford in 1924 down to his latest lecture before the University of Edinburgh in 1949? Doubtless it was his ability to get behind the words and phrases that are in current use with governments and dig down to the fundamental principles and assumptions that underlie the formal language of diplomatic documents. In *The Basis of Obligation in International Law* the author sets his course

by disposing of the doctrine that dominated the thinking of jurists for so many years, that international law arises from the consent of nations, ideas which found more concrete expression in the volume on the *Law of Nations*, published the same year.

Brierly was relentless in his attack upon "sovereignty," "independence" and "equality." In his inaugural lecture of 1924, and more forcibly in one of his last addresses in 1949, he points out the inconsistency of "sovereignty," in the sense used by governments, with the conception of law. "Sovereignty" and "Independence" are continually being reduced in actual content, but being used by governments as if they still meant what they meant a generation or a century before. So too with "equality," which in fact represents only a small area of what the word itself implies. Associated with his attempt to relate those ideas to the actual facts of international intercourse was his attack upon the doctrine of "fundamental rights," which seemed to him to encourage states to take positions out of line with the practical conditions of international intercourse. One of the many enlightening passages in the volume comments upon the danger lest the codification movement should present the problem of peace "as so much simpler than it really is." Commenting upon the draft codes of American international law published by the Pan American Union in 1925, he observed that the "definite step in the progress of civilization and the promotion of peace," which Secretary Hughes found in the draft conventions, would only be taken by way of a code of international law "when that code is one that the nations enter into for the purpose of recognizing not only the rights, but also the reasonable interests of other nations, rather than for that of proclaiming their own 'complete independence, liberty and sovereignty.' " That is what we are now trying to do thirty years later, taught by the bitter experience of the second World War.

Not a single one of the twenty-nine papers is without its words of wisdom, down to the closing comments on the United Nations:

Institutions cannot of themselves create a community, but they can provide the soil in which men can learn to work together and grow into a true community; that is what an institution like the United Nations does, and why, with all its imperfections, it is our duty and our interest to support it.

A lengthy appreciation by Sir Hersch Lauterpacht adds its own separate value to the volume.

C. G. FENWICK

Mezhdunarodnoe Pravo (International Law). Akademiya Nauk SSSR. Institut Prava. (Academy of Sciences of the U.S.S.R. Institute of Law) Moscow: 1957. pp. 471. 11 rubles 75 kopeks.

The U.S.S.R.'s most distinguished international lawyers have joined for the first time since Stalin's death to write a general textbook for use in Soviet law schools. Under the responsible editorship of Judge F. I.

Kozhevnikov of the International Court of Justice, the venerable Professor E. A. Korovin, and former International Court Judge S. B. Krylov, together with four newcomers (V. V. Evgenev, S. V. Molodtsov, K. Y. Chizhov and V. M. Shurshalov) there has been prepared what amounts to a revised edition of the general textbook published in 1951 under Korovin's editorship.

There is no less militancy in this volume than in its predecessor. Professor Korovin in his section still finds it desirable to attack American international lawyers as "the most fanatical defenders of imperialism," singling out for special attention Philip Jessup for saying that state sovereignty is an archaic concept, Clyde Eagleton as an apologist for world government and law, Pitman Potter as an exponent of preventive war, Charles Fenwick as representing the militaristic theories of the German General Staff, and the American Society of International Law and its *JOURNAL* as showing in recent times the greatest activity among bourgeois internationalists. Books on Soviet attitudes toward international law by Taracouzio, Calvez and Lapenna are dubbed "pseudo-scientific falsifications misinterpreting Soviet international law principles and practice." C. C. Hyde is accused of idealizing American international practice.

Korovin avoids the argument into which he fell in the 1940's in trying to determine whether international law was bourgeois or socialist. He defines international law as

a complex of norms regulating the relations between states in the course of their struggle and collaboration, having as its aim the guarantee of their peaceful coexistence, reflecting the will of the ruling classes of these states, and defended in case of necessity by compulsion exercised by states individually or collectively.

He finds that the Soviet Union and other socialist states are enriching international law and contributing to its positive development by creating new international acts to further its fundamental principles, such as sovereign equality of states, self-determination of nations, impermissibility of intervention in internal affairs, territorial inviolability, peaceful coexistence and collaboration of states regardless of their social structure, the honest execution of obligations voluntarily assumed. There is no suggestion in his pages that some of these listed principles have found a place in the arsenal of Soviet foreign policy to prevent realization of some of the major attempts of recent years to organize a world community of states, which to most Americans seems essential to preservation of peace and improvement of the economic condition of men.

There is still a suggestion that a new socialist international law is to be reckoned with. In spite of some recent denials by Korovin's colleagues that there is socialist international law to be opposed to present international law, Korovin sees new forms of international collaboration appearing, "which can be looked upon from the point of view of law as elements giving birth to socialist international law which belongs to the great future." He considers present law to be

the reflection of the congruence of wills of a long line of states in the form of an international treaty or custom established as the result of long practice.

While the death of Stalin seems not to have reduced Professor Korovin's ardor in attacking the non-Soviet world, it has permitted him to be less passionately patriotic in his account of the history of international law. Grotius is no longer removed from his position in history to be replaced by Marx and Engels, as he was in one of Korovin's earlier works. Grotius is now called "the father of the European science of international law." Marx and Engels are called the men "who provided the first really systematic analysis of basic problems in international law in the period of premonopoly capitalism." Korovin insists that international law does not begin with Grotius, but holds that the motherland of international law must be recognized as being China, India, Egypt and other states of the ancient East. He argues that the Russian people and the Russian state in the capitalist epoch added markedly to international law.

Stalin's death has permitted Korovin to refer to some works never mentioned in Stalin's declining years. Thus, the book of E. B. Pashukanis is listed in the text, although not in the working bibliography at the end of the book, and Korovin's own 1924 volume, which was in eclipse for many years, is mentioned in both places.

Detailed institutions of international law appear in the works of Korovin's colleagues, which follow his general exposition. Judge Kozhevnikov writes on treaties to say that the unchanging tradition of Soviet diplomacy is to struggle against the reactionary revision of treaties, and that no revision of the United Nations Charter is acceptable if it has the tendency of shaking the foundation of the organization, namely, the unanimity of the great Powers in the Security Council. Judge Krylov writes on the International Court in critical terms of its opinions in the *Corfu Channel* case, the *Morocco* case between the United States and France, the advisory opinions on the Peace Treaties and South African trusteeship, but he finds it possible to add that "the Court has in many cases issued a correct decision and given well founded advisory opinions."

The lesser-known authors treat the details of territory, citizenship, subjects of international law, and foreign policy agencies. Airspace is claimed to be the territory of a state to an unlimited height above its land and territorial waters, including both troposphere and stratosphere. Nothing is said of the problem of Sputnik navigation. The Chicago Convention of 1944 is denounced because "it conflicts with the sovereignty of states over air space." The Arctic sector principle, long espoused by the U.S.S.R., is declared inapplicable to the Antarctic, since the littoral states are thousands of kilometers from the Antarctic Continent. From this it is argued that the question of the Antarctic regime must be decided by taking into consideration the rights and interests of all interested states, and

None of the states now pretending to rights to decide the questions of the regime of the Antarctic have any better reasons (historical, economic, political or legal) than has the U.S.S.R.

Asylum is considered from the point of view of its purpose. If it aids one working for revolution in his homeland, it is legal. If it aids one fleeing the U.S.S.R., it is aggressive and reactionary. The asylum given in the U. S. Legation in Budapest to Cardinal Mindszenty is denounced as illegal in international law, although it is admitted that the right of asylum is recognized in Latin America. Extradition is likewise considered from the point of view of the purpose to be achieved. It is hailed as progressive when used between Eastern European states to assist in punishment of dissidents, but denounced when used for reactionary purposes as a means of political struggle between states.

Professors Jessup, Lauterpacht and Scelle are criticized for trying to broaden the circle of subjects of international law to include international organizations and physical persons. It is admitted that international organizations can have wide powers, even like those of a subject of international law, but they cannot be considered to be the same as the states that create them, for to be a subject of international law one must have territory and population, and an international organization has neither.

This volume will undoubtedly be translated by foreign offices and scrutinized for its hints as to future Soviet policies. Professor Korovin wrote long ago in reviewing Taracouzio's book, *The Soviet Union and International Law*, that an error had been made in supposing that Soviet professors spoke for their government in their treatises. Surely a line must be drawn between a professor and the Soviet Foreign Ministry, but Soviet review procedures are such that a manuscript as important as the present one could hardly be published until it had been criticized and approved by the political authorities. It may be repudiated, but its general tenor suggests the direction of Soviet foreign policy in the post-Stalin era.

JOHN N. HAZARD

Chung-kuo yü kuo-chi-fa (China and International Law). Vol. I. By Tang Wu. Taipei, Taiwan: Chinese Cultural Publishing Commission, 1957. pp. xxii, 274. NT\$17.00.

This book is one of the newest additions to the Chinese literature on international law. The author is a Chinese career diplomat with wide experience and is now the Chinese Minister to Liberia.

This volume, the first of four volumes of the work, contains nine chapters dealing with the historical background, the basis, the theories, the rules and the supremacy of international law (Chapters 1 to 5), the organization and members of the international community (Chapters 6 and 7), and the problems of recognition (Chapters 8 and 9). It took the author almost four full years to complete his manuscript (Preface, p. ii), and, as evidenced by the extensive footnotes, there is really a great deal of laborious work involved.

It is especially gratifying to the reviewer to see that the author shares his ideal of making good use of Chinese source materials side by side with those usually available to scholars in the West. Certainly, the author has

rendered a valuable service by setting straight certain essential facts concerning some of the most controversial problems of international law in China's international relations during recent years, such as the closure of the seaports of the Chinese mainland (pp. 264-268).

However, there are several points upon which second thought might be helpful. First of all, the content of the book does not seem to justify the title. When one reads the title "*Chung-kuo yü kuo-chi-fa*," he would be naturally inclined to believe that it must be a specialized book like Jean Escarra's *La Chine et le droit international* (Paris, 1931), dealing with China's special problems of international law. As a matter of fact, this book is not so specialized, but is a general treatise on international law, with occasional references to China.

Some terms used by the author are rather of a novel type of doubtful value. For instance, he advocates the use of the term "State under international law" in place of the simple word "State" for the "convenience of study" (p. 185), and so he did (pp. 186; 215). He cites J. L. Brierly's *Law of Nations* in support of his contention, but a check on that book reveals that Brierly has never used such a term. The nearest inference is probably this subtitle: "*General Notion of States in International Law*" (Italics are reviewer's) in Chapter IV thereof.

The author seems to be fairly objective throughout the whole volume, although marked nationalism and patriotism are understandably visible here or there. It is a commonplace for Chinese writers to use the first person instead of the third person, and the present author makes no exception to this practice (pp. 11, 15, 17, 29, 31, 34, 37, 41). These and other similar technical defects can easily be eliminated when the book comes up for revision in the future.

SAMUEL SHIH-TSAI CHEN

Interpretacja Traktatów (Interpretation of Treaties). By Ludwik Ehrlich. Warsaw: Wydawnictwo Prawnicze, 1957. pp. 235.

In 1928 Professor Ehrlich delivered a series of lectures at The Hague on the interpretation of treaties, which were published in the *Recueil des Cours de l'Académie de Droit International* in 1929. The present book is a new treatment of the subject from a different perspective. In it the author traces the history of the principles of the interpretation of treaties to Cicero's *De Officiis*, while in the Hague lectures the historical part began with Gentilis. In addition, the years 1929-1956 have produced numerous new judicial decisions, in particular some sixty rulings on the interpretation of treaties by the Permanent Court of International Justice and numerous theoretical works, including the Draft of the Convention on Treaties with a commentary prepared by the Harvard Research in International Law, the discussions of the *Institut de Droit International* at its sessions at Bath (1950), Siena (1952), and Granada (1956), and many monographs and major works containing chapters on the subject. Although no change has been made in the organization and arrangement of material of the present book, it is substantially a new work.

The work consists of six chapters: I. The Problems of Method; II. History; III. Fundamentals; IV. Necessary Premises of the Interpretation of Treaties; V. Search for the Intention of the Parties in the Text; and VI. Search for the Intention of the Parties Beyond the Text. The fundamental fact which in the last analysis determines, according to the author, the rules of interpretation of treaties is the co-existence of sovereign states which can be bound only by their own will. Consequently he takes a different position from Professor Hyde, according to whom "it is the contract which is the subject of interpretation, rather than the volition of the parties." Professor Ehrlich, proceeding from the principle of good faith, states that "international agreements must be interpreted . . . so as to bring about the result which the parties to the agreement really intended. . . ." In his search for the rules of interpretation leading to the discovery of the real will of the parties Professor Ehrlich points out that

it so often happens that many different men and groups of men take part in drafting what ultimately becomes the text of a treaty that the conception of the will of the parties must in each particular case be understood in the light of the peculiar circumstances of the case.

Consequently there are no hard and fast rules of interpretation of international treaties. "Common rules of international law offer only certain presumptions which are recognized in practice but may be rebutted in any individual case." In each case the criterion for the acceptance or rebuttal of an interpretation of the text of a treaty is the will of the parties.

The historical part of the book has been enriched by an analysis of the views of several authors who were not included in the 1929 version. In addition to the analysis of Cicero, Professor Ehrlich has included one of medieval canon law, of the views of important canonists (Bartolus, Baldus and Panormitanus), of the Polish jurist Przyłuski, of the views of Zwinger, whose work *Theatrum vitae humanae* (1565) contained a chapter on the interpretation of treaties and was used by others, among them Gentilis. Among the new material important for the tracing of the history of jurisprudential writings on the subject the author also discusses the *De foederum iure* by Besold, a less well-known but important jurist of the seventeenth century.

An extensive summary in English adds to the value of the book which thus is made useful to a public not conversant with Polish.

There is no need to stress the importance of the subject which is one of the pivotal questions of international law, where agreements between states are the principal source of its growth and development. Clarity of exposition, consistent reference of the argument to the basic principles of international law, and constant illustrations of the argument by international practice and literature make this book an outstanding addition to the literature of international law.

KAZIMIERZ GRZYBOWSKI

Le Riserve nei Trattati. By Edoardo Vitta. (Università di Torino Memorie dell'Istituto Giuridico, Memoria XCVII.) Torino: G. Giappichelli, 1957. pp. 154, L. 1400.

About five years ago the controversial advisory opinion of the International Court of Justice, by an almost evenly divided court, on *Reservations to the Convention on Genocide* (1951), the different conclusions reached in the matter of reservations to multilateral treaties by the International Law Commission at its third session (1951), and the somewhat inconclusive Resolution 598 (VI) of the General Assembly on reservations to conventions negotiated under the auspices of the United Nations (1952) caused a flurry of writings in which the whole topic of reservations to multilateral treaties was hotly, even though not always competently, debated. The entire subject has now been reconsidered in a calmer and more detached view in this valuable book by Professor Vitta. While he shares the interest of most Italian scholars in the theoretical aspects of international law, his exposure to common-law technique and thinking during several years of his life outside of Europe, has taught him to subordinate strictly logical considerations to the hard realities of international life. No wonder, therefore, that in this monograph on an intensely practical subject he has given due consideration to the fact that the number of multilateral conventions as well as the number of states eligible to become parties to them has greatly increased and that, as a consequence, the number of possible conflicts with regard to each of a multilateral treaty's provisions has increased to an even greater extent. This is the reason why international organizations, under whose auspices most of the multilateral conventions have been drafted and negotiated (e.g., the Organization of American States and the United Nations), have sought ways and means whereby the lack of assent to some minor point by all of the prospective parties should not prevent the convention from acquiring binding force, at least as to the major provisions, among all the states that are in agreement as to the latter. These practical considerations underlie the various attempts at circumventing, if not altogether departing from the so-called classical theory of reservations, which maintains that a state entering a reservation to a convention may not become a party to the convention unless all the other parties have assented to such reservation on its part.

Rather than expressing his own views on the subject, Vitta in the present work seeks to set forth the subject in a clear and systematic manner. Thus, the first chapter of his work (pp. 7-58) describes and classifies the various types of reservations (i.e., reservations during negotiation, upon subscription and upon ratification of or adhesion to a multilateral convention). The second chapter (pp. 59-96) explains the differences in nature and effect between the various types of reservations. The third chapter (pp. 97-142) analyzes the nature and scope of the various devices adopted to give effect to treaties even though reservations entered into by some members have not been assented to by all other parties, the

specific results which those devices seek to achieve and the extent to which they are valid under present rules of international law.

Vitta's work gives a clear, orderly and complete picture of a topic which is presently in a state of flux. It would be presumptuous to hope for more at this time in view of the almost hopeless state of confusion into which the entire topic of reservations to multilateral treaties has been thrown.

ANGELO PIERO SERENI

Collective Security under International Law. By Hans Kelsen. (U. S. Naval War College, International Law Studies, 1954. Vol. XLIX.) Washington: U. S. Government Printing Office, 1957. pp. vi, 275. Index. \$1.75.

Professor Kelsen's high standing as a scholar is sufficient to commend in advance any volume that comes from his pen. But in this case he has chosen a subject that will at once challenge attention. The main function of the volume, in the words of the author, "is to show that collective security is an essential function of law," that it is "by its very nature a legal problem." A generation ago there were many in high places to contest the thesis. Today the bitter lesson of two world wars has established the principle for practical purposes, in spite of the difficulty of putting it into practice. But the legal aspects of the thesis remain to be clarified, and this is what Professor Kelsen does with all his power of legal analysis and systematic presentation.

After a survey of the different degrees of collective security, dealing chiefly with the peaceful settlement of disputes and the removal of the causes of the illegal use of force, the author proceeds to distinguish between collective security under general international law and under particular international law. The distinction is a bit subtle, but it amounts to the distinction between customary law and treaty law when not all of the states are contracting parties. Under the head of "particular international law" the chief problem is the definition of aggression, which the author analyzes in all of its possible forms, distinguishing between methods of defining aggression and presenting clearly the difficulties in determining the aggressor. This is followed by an equally careful analysis of sanctions and of preventive measures, and under this head a discussion of the problem of disarmament.

The volume, being closely reasoned, is hard reading in places and the reviewer wishes that some of the illustrative material in the extensive notes might have been woven in the text. But we must be grateful for what we are given, an acute analysis of a fundamental principle, the applications of which we can make from our own knowledge of recent history.

C. G. FENWICK

Evolution or Revolution? The United Nations and the Problem of Peaceful Territorial Change. By Lincoln P. Bloomfield. Cambridge: Harvard University Press, 1957. pp. xii, 220. Index. \$4.50.

The United Kingdom has long surpassed the United States in producing polished little books packed with big ideas. The volume reviewed here is one of the few American products that can be said to have attained this admirable standard. It is a closely reasoned, gracefully written, and mercifully brief essay on the age-old problem of peaceful change, with special emphasis on the contributions of the League of Nations and the United Nations.

While the author recognizes that the term peaceful change can be, and has been, stretched to cover many different functions, he quickly sets the reader straight by defining precisely what he intends to focus on: "the transition of territories from one international political and legal status to another, primarily by nonviolent means." The first chapter is a philosophical curtain-opener followed by four chapters on the League of Nations experience and three on the United Nations. Then come two chapters on the legal aspects of the problem and finally two on the implications of the study for United States foreign policy.

The marrow of the author's thesis can best be conveyed by summarizing some of his principal conclusions. He suggests, for example, that the major factors that have determined the success of peaceful settlement efforts include: (1) whether there is a "direct clash of interests between hostile great powers"; (2) the "magnitude of the problem to the parties"; (3) the "degree of intensity of feeling generated by an issue"; (4) whether the United Nations is involved; (5) whether there is "prior agreement among the parties"; and (6) whether the societies involved "are pursuing finite goals which . . . can be negotiated peacefully." This list does not pretend to be exhaustive, but it does present a revealing and useful line of reasoning. Perhaps the most conspicuous omission is the factor of whether the major, as well as other, powers, when they are not directly involved, use their influence to encourage peaceful settlement.

The author is somewhat less clear in telling us where he stands on the general usefulness of the United Nations in the cold war. In one place (p. 133) he says; "The value of the United Nations in the East-West conflict in terms of peaceful settlement . . . , peaceful change . . . , and universal collective security . . . is highly questionable." In another place, (p. 128) he praises the United Nations for extraordinary achievements in one of the most threatening cold war situations: "In Korea it blocked violent change and brought about peaceful change in the South." Further down the same page, he adds the modifying note, "The one act of 'displacement' was the defeat of the communist attempt to alter the deadlocked *status quo* in Korea, but this ranks as collective security action, and was certainly not peaceful change on either side." One does not blame the author, of course, for experiencing some difficulty on this point, for this is a most complex experience to appraise. Those who have

emerged with simpler conclusions have seldom equaled Mr. Bloomfield's understanding of the problem.

Despite the author's emphasis on his practical realism, perhaps the most striking aspect of his work is his conclusion that a standard and a community above the nation-state are not only desirable but feasible and presently emerging: "It is often helpful and necessary to set . . . [a] presumptive fusion of goals against the particular interests of members, as the standard to which they should aspire and even conform." "Above all, it (the United Nations) can work to create new building blocks of international community from which organization and law will follow." It is heartening to find a practitioner who sees the faint strands of common interest that are beginning to thread their way across national boundaries, as well as the undeniably stronger loyalties that are still entwined about the individual nation-state.

H. FIELD HAVILAND, JR.

Die Vereinten Nationen und die Nichtmitglieder. By Josef Söder. Bonn: Ludwig Röhrscheid Verlag, 1956. pp. 283. DM. 24.

The problem of relations with non-member states has troubled most if not all international organizations in recent decades, especially the League of Nations¹ and the United Nations. The provision in the League Covenant relating to this matter (Article 17) was very mild and was never invoked—it would probably have had no effect in any case. The provision in the United Nations Charter (Article 2, paragraph 6) dealing with this matter is extra-legal, pretentious, and purely political. It has not so far had any effect.

Dr. Söder's monograph is thorough, competent and intelligent. The author deals with the position of the United Nations in general international organization, the aims of the United Nations, procedure, and then the constitutional and practical position of non-members in (*sic*) the United Nations, broken down by reference to general and special organs thereof. A further section deals with the purely juridical aspects of the matter.

The author reaches the wise conclusion that much remains to be done in this matter or, in fact, that we do not know exactly where we stand in relation thereto. He gives us a splendid start in this research.

PITMAN B. POTTER

Les Nations Unies et la Conservation des Ressources de la Mer. By H.Ph.Visser 'T Hooft. The Hague: Martinus Nijhoff, 1958. pp. vi, 426. Index. Gld. 24.

The present volume, appearing on the eve of the Geneva Conference, is still of great value for an interpretation of the work of the Conference in spite of the vast documentation and the record of the exhaustive dis-

¹ The League and Other International Organizations (Geneva: Geneva Research Centre, 1934).

cussions that marked the attempt to formulate new laws of the sea. The author has the happy faculty of formulating principles in clear and specific terms, and the equally happy faculty of proposing clear and definite conclusions for the problems before him.

By way of background for the study of the conservation of the resources of the sea, Part One of the volume enters upon an analysis of the general problem of codification, which might, indeed, prove to be a useful introduction to any other study of an attempt to modify existing traditions to the new needs of the international community. In this connection the examination of the distinction between "codification" and "progressive development" is shown to be without adequate basis, and it has now been rejected in the practical work of the International Law Commission.

Part Two enters upon a "case-study in codification," *i.e.*, the work of the International Law Commission in handling the problem of the conservation of natural resources. Here the study directs itself to the concrete aspects of the situation, the powers of the coastal state and the modern conditions justifying certain extensions of coastal waters; the claims made at Mexico City in 1956 and at the Conference at Ciudad Trujillo; the urgency of codification and the principles adopted at the Rome Conference, and the final draft of the International Law Commission. Part Three presents the problem of codification in its political setting, the elements involved and the "encounter," as the author describes it, between the general interest and political realities.

To be commended is the English version of the Table of Contents which follows the French text, enabling those whose knowledge of French is less complete to segregate a particular issue which they wish to study more in detail.

C. G. FENWICK

Soviet Satellite Nations: A Study of the New Imperialism. A Symposium Edited by John H. Hollowell. Gainesville, Florida: Kallman Publishing Co., 1958. pp. 244. \$3.00.

Stiff resistance to Soviet expansionist military schemes will prevent their realization. On the other hand, when there is chaos already existing in an area bordering the U.S.S.R., Soviet troops appear. This is the conclusion of several authors in Professor John H. Hollowell's symposium on Soviet policies, both within satellite areas and beyond to non-Satellite border states. Authors on the Middle East, India and China suggest that Comintern doctrine bears rereading to understand current Soviet policies. They indicate Soviet intent to join with native bourgeois elements in ousting feudal forces before any attempt to establish Communist parties as monopoly rulers. Soviet troops can be relied upon to remain outside the Middle East as long as Nasser retains power, and likewise India will not be marked for invasion while Nehru and the Congress are popular and prevent chaos.

This and other insights make Hollowell's volume valuable, even though the rush of events has already dated it. George Lenczowski's chapter on

the Middle East will naturally attract most attention. He finds that Communism as an ideology in the area has primary appeal to educated and semi-educated city dwellers, and not to agricultural workers or the poor. These elements join Communism because it offers in their minds a way to pay back the West for setting up Israel and perpetuating certain elements of colonialism. This and not any deep-seated desire for adoption of Soviet-type societies motivates them, and there are few deterrents such as attachment to civil liberties in Arab society to provide the restraint to Communist-inspired united fronts which one finds in the West.

Indian intellectuals are moved to sympathy with the U.S.S.R. for other reasons in the eyes of Gene D. Overstreet. He suggests they favor the Soviet Union over the United States because of the former's lower standard of living which makes it appear to possess a purer, a more "spiritual," technology, one which is more worthy of imitation. If this be true, it is evident how much we Americans have to learn in drafting our information programs for Asia.

For the areas already within the Soviet orbit the authors present similarly arresting ideas. Hannah Arendt suggests that post-Stalin relaxation is due not to pressure from below but because purge policies create prohibitively high costs in human material. She excludes multi-party systems as a possible entering wedge for democratic forces in these areas because of Continental attitudes toward parties. She finds such forces rather in the workers' councils. Zbigniew Brzezinski foresees no real advance of democratic forces in Poland because in his view the Soviet system requires acceptance of the primacy of the U.S.S.R. and the dictatorship of the proletariat as defined by the U.S.S.R. Edward Taborsky sees no liberalization in Czechoslovakia because the rulers need Soviet support to stay in power, and further, as opportunists, rather than Communist enthusiasts like Tito, they have no interest in developing Communism as a living program. He finds that only real believers are innovators.

Symposia provide such varied fare that no review can do justice. Suffice it to say that this book is challenging in presenting sometimes unsuspected elements that make for Soviet success and failure along her frontiers.

JOHN N. HAZARD

American Foreign Policy, 1950-1955. Basic Documents. Department of State, General Foreign Policy Series 117 (Publication 6446). Washington, D. C.: U. S. Government Printing Office, 1957-58. Vol. I: pp. lx, 1708; Vol. II: pp. lxxxv, 1709-3245. Index. \$5.25 each; \$10.50 a set.

These volumes inaugurate an annual series, compiled at the request of the Secretary of State, which is as useful as a collection as it is revelatory of what the Government regards as foreign policy. Action or the position taken on nearly 200 subjects are set forth in 997 documents, which in many cases continue the record of the Senate Committee on Foreign Relations, *A Decade of American Foreign Policy: Basic Documents, 1941-49*. The

selective assembling of these papers by the Historical Division of the Department of State provides a record of the matured decisions on the numerous questions which have come before it. Almost any inquirer will find the selection as satisfactory or more so than one he would whip up for himself on a subject. A very large number of subjects are covered not only by the decisive documents but also the explanatory or expositional statements by officialdom at the time.

The period covered by the book includes part of the tenures of two Presidents and two Secretaries of State. Their State of the Union messages and speeches on the principles and objectives of foreign policy are not as sharply contrasted as their known personalities. Throughout the 20 parts into which the book is divided the continuity of policy is more evident than its divergence under different hands. On the other hand, volubility in 1950-52 was considerably less than in 1953-55, notwithstanding that this record includes, for example with treaty texts, relevant messages, reports and excerpts from hearings, as well as liberal reprints from news conferences.

No incident, negotiation or transaction occurring within the period is omitted, to the best of the reviewer's recollection. Treatment varies from the bare records in such matters as the Oatis or Vogeler cases, the Goa comment, the Habomai Islands incident, to the essential documentary story of Korea from invasion to armistice. The quantity and diversity of this material raises the question of where "foreign policy" may be found. Everything in this book is presented officially as American foreign policy, and we may accept the claim if we grant that some documents establish, define or record foreign policy while others apply it or exemplify its exercise.

The book contains 45 treaties to which the United States is a party, each accompanied by one to three related pieces in the nature of glosses. There are as many treaties to which the United States is not a party, but the existence of which affects its interests or relations, the whole complex of European regional arrangements, the Middle East internal and external arrangements, and the Bandung Conference of April 24, 1955, being typical. Nearly 75 resolutions of the United Nations are printed, a third of them relating to the functioning of the Organization and the rest dealing with matters like Trieste, Palestine and Korea; the United States took a position on them all. There are some 50 enactments of Congress and Executive Orders, some declaring a position, others authorizing action with or without appropriations. Add half a dozen resolutions of the Organization of American States and some papers of the International Court of Justice, as well as all the reports and other papers related to the foregoing documents, and it appears that about half of the material that presents a 6-year record of American foreign policy is derived from areas recognized in international law.

The rest seems to be definable as the product of bilateral or multilateral diplomacy. Bilateral application of foreign policy is confined to a few states, Canada, Japan, the Philippines, the Communist bloc for incidents.

By 1950 the American position toward the Soviet Union was total opposition to amoral Communist methods, active insistence on military superiority against anticipated attack, and relative ineffectiveness against the many phases of subversion. Opposition to Communism and its posited threat of violence permeate American foreign policy as displayed in this book, showing their effects in the security, economic and foreign aid activities, as well as relations with Latin America. With other states agreement was easily reached. With the Soviet Union, on either the bilateral or multilateral plane, negotiation was tortuous and indecisive and agreement so unreliable that American frustration was more frequent than satisfaction. These papers exhibit the Soviet technique in gaining its way. Moscow is at once rigidly legalistic, meticulously procedural and also completely disregarding of all rules or customs; the ambivalence of Soviet tactics very often precludes resolution of questions readily solvable with any other type of state. These deliberately erratic and vagarious practices make for the uncertainty which the Soviet Union uses to pursue its own policy. The pattern is evident throughout these papers, whether the deal is with Moscow alone or in association with others. When the Soviet Union is in the negotiation, which is much of the time, neither the rules of law nor the reasonable precepts of diplomacy are much in evidence.

The 20 parts into which *American Foreign Policy: 1950-1955* is divided geographically cover the world both in bilateral and in multilateral relations. The United Nations, the peace settlements, the North Atlantic Treaty Organization, the European regional arrangements, the worldwide security system, disarmament, atomic energy, most of the economic sector are in the multilateral framework of foreign policy. Only in conference *communiqués* is this adequately reflected, for the selection of documents is quite rigidly confined to the American side of the matter. The excellent and extensive footnotes, however, provide citations to follow the positions of other participants. They do more, by providing background, cross-citations and in binding together related material such as various phases of Germany's re-advent into the family of nations.

DENYS P. MYERS

The Changing Environment of International Relations. A Major Problem of American Foreign Policy. By Grayson Kirk, Harrison S. Brown, Denis W. Brogan, Edward S. Mason, Harold H. Fisher, and Willard L. Thorp. Washington, D. C.: The Brookings Institution, 1956. pp. x, 158. Index. \$2.50.

Indian Foreign Policy, 1947-1954. A Study of Relations with the Western Bloc. By J. C. Kundra. Gröningen (Netherlands): J. B. Wolters, 1955. New York: Institute of Pacific Relations, 1956. pp. xi, 239. Index. \$4.50.

The distinguished and discerning lecturers in the 1956 Brookings Lecture Series take up various aspects of the profound changes taking place in the

framework of international relations as the result of dynamic forces, most of which, as President Robert D. Calkins points out in his Foreword, "would be in existence even if the cold war did not exist" (p. vii). The common aim of the contributors is to analyze the effects of these forces during the near future and their probable impact on American foreign policy problems. Much stress is laid, of necessity, on the aspirations of the new nations of Asia and Africa. The chapter topics are "Mass Aspirations and International Relations" (Grayson Kirk); "Science, Technology and International Relations" (Harrison S. Brown); "Conflicts Arising Out of Differing Governmental and Political Institutions" (Denis W. Brogan); "Emerging Requirements for an Expanding World Economy" (Edward S. Mason); "Asian Cooperation with the West: Conditions and Expectations" (Harold H. Fisher); and "American Interest in Asian Development" (Willard L. Thorp). Of these contributions, those of President Kirk and Professor Fisher are, perhaps, the most basic challenges to our thinking.

Dr. Kundra's study of India's foreign policy is scholarly, detailed and calm in its approach. It emphasizes India's relation with the leading Western Powers, especially "where these relations influenced India's attitudes and actions with regard to the West" (p. vii). A very helpful and extensive introductory chapter provides "A General Background to Indian Foreign Policy," dealing with India's history, geographical position, and the thought pattern of the Indian people and the ideological position of the ruling party from 1947 to 1954. The other chapters deal, respectively, with "Indian Foreign Policy—Reasons, Aims and Purpose," "The Western Bloc, India and the Alliances," "Indo-American Relations," and "India and the Commonwealth," and "Conclusion." The book contains many important statements on Indian foreign policy towards the West and deals with the actions taken by the Government of India in pursuance of that policy. This carefully and fully documented study—with numerous references to Indian source material not easily available in this country—can only be of great profit to the American student of world affairs in general and of the bases of American foreign policy in particular.

JOHN BROWN MASON

Control of Japanese Foreign Policy: A Study of Civil-Military Rivalry, 1930-1945. By Yale Candee Maxon. (University of California Publications in Political Science, Vol. 5.) Berkeley and Los Angeles: University of California Press, 1957. pp. viii, 286. Index. \$6.00, cloth; \$5.00, paper.

This book is what its subtitle suggests, and more. In the "doing," its author not only has dealt with the socio-political structure of the Japanese state, with law and with politics, but has ventured into the realms of political philosophy and speculation, and has essayed the rôle of critic and teacher.

Dr. Maxon served for three months in 1946 as official interpreter for the interrogations of General Tojo. He has made extensive study of Japanese documents, of American documents, and of "General Works," accounted for in 34 pages of footnotes and an interesting section (15 pages) dealing with "bibliography."

The pen may or may not be mightier than the sword, but matured traditions are in many contexts more likely to be effective than is a newly uttered constitutional Edict. Much depends on "whose" and "wheres." In Japan there were, as of 1930, two constitutions, one that of tradition, in which government and politics were the business of the feudal lords and the essentially military aristocracy, the other the written document in which, by gift of the Emperor in 1889, the country had been made a constitutional monarchy.

During the decade which followed World War I, practice in accordance with the written Constitution appeared to have become the accepted order; but after 1930 and first conspicuously signalized in the Manchuria incident, the military services, the Army in particular, took the bit in their teeth or, as Secretary of State Stimson put it, "ran amok"; and by 1941 those Services were in full control. It was the military element that engineered the Manchuria incident, the China incident, Pearl Harbor and Japan's rôle in World War II. The duality which prevailed in Japan's governmental functioning was a phenomenon little perceived and less understood outside of Japan. To some Western minds it was incomprehensible.

The account which Dr. Maxon gives of what occurred in the struggle for control of foreign policy is a story of politics *infra*, *inter* and *supra*, of policies dictated by extremists, of "government by assassination," of decisions made in ignorance of essential facts and under pressures of fear, of confusion of loyalties, and finally, in the face of military defeat and with courageous intervention by the Emperor, of regaining of their rightful position by the lawfully constituted authorities.

In his deploying of facts—unduly many, perhaps—the author has been on the whole objective, but in some of his *obiter* comments, there are indications that subjectively he is anti- the military.

Once upon a time in reply to a question set by this reviewer, a Chinese schoolboy wrote: "Sovereignty is an invisible [*sic*] something which sometimes appears where it does not seem to be." In any attempt to locate the ultimate source of authority in Japan during the 1930-1940 decade, that weird definition might well be considered. And, for an enlightening example of the difference that there may be, in the governing process, between theory and practice, one may well turn to this book which, well explained in the author's preface and its table of contents, well summed up in a chapter (VIII) of conclusions, and well indexed, may safely be recommended to students and teachers of history, of law, of politics, and of Far Eastern affairs.

STANLEY K. HORNBECK

La Etica Colonial Española del Siglo de Oro. By Josef Höffner. Spanish translation by Francisco de Asis Caballero. Introduction by Antonio Truyol Serra. Madrid: Ediciones Cultura Hispánica, 1957. pp. xxxiv, 573. Index.

This German work, published in Spanish translation, on the colonial ethics of Spain's Golden Century, investigates the Spanish discovery and conquest of America primarily from an ethical point of view. As the Spain of the sixteenth century still had strong ties with the ideas of the Middle Ages, and as the Spanish Neo-Scholastic theologians and jurists, although "modern," continued the philosophy of St. Thomas of Aquinas, the author gives in the first part the historical-spiritual background of the conquest: the theocratic tendencies toward the universal rule of the Pope, the universalist tendencies toward the worldwide rule of the Emperor, the "*orbis christianus*" as the continuation of the *Imperium Romanum*, the doctrine of the *bellum justum*, religious intolerance against pagans, Jews, Arabs, and heretics, medieval ideas about slavery.

The second part treats the historical-political background: the clash between two worlds, the ancient Indian cultures, the Spanish character, proud of their "*limpio sangre*," idealistic, heroic, imbued with the consciousness of a national mission for which Christianization and Hispanization were one and the same thing, pride, an enormous feeling of personal and national honor, deeply and sincerely Catholic. But there was also in the Conquistadores cruelty, the wish for glory, the insatiate thirst for power and gold, the disdain for non-military labor.

The principal part shows in detail the awakening of the Christian conscience to which the survival of the Indian race in Latin America is due, the battle of ideas and in politics between the conquerors and the missionaries who defended the human dignity of the Indians. There was already in 1511 Padre Montesinos in Haiti taking a strong stand against the conquerors. There was the great Bartolomé de las Casas, "*el padre de los indios*," there were the missionaries who became scholars in the great Indian languages and cultures. And then the scholars carry the torch: Francisco a Vitoria, Domingo de Soto, Luis de Molina, Francisco Suárez. Starting from moral theology in their investigation of the problem of "the Indies," discussing the different "titles of conquest" opposed to the universal rule of the Pope or Emperor, defending Indian states and rulers as legitimate, recognizing the division of the world into sovereign states, insisting on the right to travel, defending the freedom of the seas, they became the founders of the "new science of international law" long before Grotius, who heavily relied on them.

The work is written with German "*Gründlichkeit*," with a truly amazing knowledge of the original historical, philosophical and legal sources, and with perfect scientific impartiality and objectivity. The author attacks the "black legend" which nowadays has been abandoned even by British historians. But he does not want to replace it with an equally anti-historical "rose legend." He fully sees the inhuman atrocities which were committed, forced labor and the system of "*encomiendas*," the negro

slave traffic. But all that had been done too by all the other colonial Powers. On the other hand, he recognizes the grandiose work Spain has done by the discovery, Christianization and civilization of the Americas. And he duly emphasizes that Spanish theologian-jurists took, under Spain's absolutism, a strong stand in favor of ideas which were not that of the state.

This important book is timely; there is a certain analogy between the situation of the sixteenth century and our present epoch. The book should also contribute to doing away with the remnants of the "black legend" as a prerequisite for a true Pan American "good neighbor" policy. Finally, the book is interesting to the international lawyer, as it shows the development of international law and its science.

JOSEF L. KUNZ

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ELEANOR H. FINCH

OFFICIAL DOCUMENTS

UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA

GENEVA, FEBRUARY 24-APRIL 27, 1958

FINAL ACT¹

1. The General Assembly of the United Nations by resolution 1105 (XI) of 21 February 1957, decided to convene an international conference of plenipotentiaries to examine the law of the sea, taking account not only of the legal but also of the technical, biological, economic and political aspects of the problem, and to embody the results of its work in one or more international conventions or such other instruments as it might deem appropriate. The General Assembly also recommended that the conference should study the question of free access to the sea of land-locked countries, as established by international practice or treaties.

2. The Conference met at the European Office of the United Nations at Geneva from 24 February to 27 April 1958.

3. The Governments of the following eighty-six states were represented at the Conference: Afghanistan, Albania, Argentina, Australia, Austria, Belgium, Bolivia, Brazil, Bulgaria, Burma, Byelorussian Soviet Socialist Republic, Cambodia, Canada, Ceylon, Chile, China, Colombia, Costa Rica, Cuba, Czechoslovakia, Denmark, Dominican Republic, Ecuador, El Salvador, Finland, France, Federal Republic of Germany, Ghana, Greece, Guatemala, Haiti, Holy See, Honduras, Hungary, Iceland, India, Indonesia, Iran, Iraq, Ireland, Israel, Italy, Japan, Jordan, Republic of Korea, Laos, Lebanon, Liberia, Libya, Luxembourg, Malaya, Mexico, Monaco, Morocco, Nepal, Netherlands, New Zealand, Nicaragua, Norway, Pakistan, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Romania, San Marino, Saudi Arabia, Spain, Sweden, Switzerland, Thailand, Tunisia, Turkey, Ukrainian Soviet Socialist Republic, Union of South Africa, Union of Soviet Socialist Republics, United Arab Republic, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay, Venezuela, Republic of Viet-Nam, Yemen, Yugoslavia.

4. At the invitation of the General Assembly, the following specialized agencies had observers at the Conference:

Food and Agriculture Organization;
International Civil Aviation Organization;
International Labour Organisation;
International Telecommunication Union;

¹ U.N. Doc. A/CONF.13/L.58; reprinted with annexes in Special Supplement to the International and Comparative Law Quarterly, 1958 (London, 1958).

United Nations Educational, Scientific and Cultural Organization;
World Health Organization;
World Meteorological Organization.

5. At the invitation of the General Assembly, the following inter-governmental organizations also had observers at the Conference:

Conseil Général des Pêches pour la Méditerranée;
Indo-Pacific Fisheries Council;
Inter-American Tropical Tuna Commission;
Inter-Governmental Committee for European Migration;
International Council for the Exploration of the Sea;
International Institute for the Unification of Private Law;
League of Arab States;
Organization of American States;
Permanent Conference for the Exploitation and Conservation of the Maritime Resources of the South Pacific.

6. The Conference elected His Royal Highness Prince Wan Waithayakon Krommun Naradhip Bongsprabandh (Thailand) as President of the Conference.

7. The Conference elected as Vice-Presidents Argentina, China, France, Guatemala, India, Italy, Mexico, Netherlands, Poland, Union of Soviet Socialist Republics, the United Arab Republic, the United Kingdom of Great Britain and Northern Ireland, and the United States of America.

8. The following committees were set up:

General Committee

Chairman: The President of the Conference

First Committee

(Territorial Sea and Contiguous Zone)

Chairman: Mr. K. H. Bailey (Australia)
Vice-Chairman: Mr. S. Gutiérrez Olivos (Chile)
Rapporteur: Mr. Vladimir N. Koretsky (Ukrainian
Soviet Socialist Republic)

Second Committee

(High Seas: General Régime)

Chairman: Mr. O. C. Gundersen (Norway)
Vice-Chairman: Mr. Edwin Glaser (Romania)
Rapporteur: Mr. José Madeira Rodriguez
(Portugal)

Third Committee

(High Seas: Fishing; The Conservation of Living Resources)

Chairman: Mr. Carlos Sucre (Panama)
Vice-Chairman: Mr. E. Krispis (Greece)
Rapporteur: Mr. N. K. Pannikar (India)

Fourth Committee
(Continental Shelf)

Chairman:	Mr. A. B. Perera (Ceylon)
Vice-Chairman:	Mr. R. A. Quarshie (Ghana)
Rapporteur:	Mr. L. Diaz González (Venezuela)

Fifth Committee

(Question of Free Access to the Sea of Land-locked Countries)

Chairman:	Mr. J. Zourek (Czechoslovakia)
Vice-Chairman:	Mr. W. Guevara Arze (Bolivia)
Rapporteur:	Mr. A. H. Tabibi (Afghanistan)

Drafting Committee

Chairman:	Mr. J. A. Correa (Ecuador)
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Credentials Committee

Chairman:	Mr. M. Wershof (Canada)
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9. The Secretary-General was represented by Mr. C. A. Stavropoulos, the Legal Counsel. Mr. Yuen-li Liang, Director of the Codification Division of the Legal Office of the United Nations, was appointed Executive Secretary.

10. The General Assembly, by its resolution convening the Conference, referred to the Conference the report of the International Law Commission covering the work of its eighth session as a basis for consideration of the various problems involved in the development and codification of the law of the sea; the General Assembly also referred to the Conference the verbatim records of the relevant debates in the General Assembly, for consideration by the Conference in conjunction with the Commission's report.

11. The Conference also had before it the comments by governments on the articles concerning the Law of the Sea prepared by the International Law Commission, the memorandum submitted by the preliminary Conference on Land-locked States held in Geneva from 10-14 February 1958, and preparatory documentation prepared by the Secretariat of the United Nations, by certain specialized agencies and by independent experts invited by the Secretariat to assist in the preparation of this documentation.

12. On the basis of the deliberations, as recorded in the summary records and reports of the committees and in the records of the plenary meetings, the Conference prepared and opened for signature the following *Conventions* (annexes I to IV):

Convention on the Territorial Sea and the Contiguous Zone
(adopted on 27 April 1958, on the report of the First Committee)
(A/CONF.13/L.52)

Convention on the High Seas
(adopted on 27 April 1958, on the report of the Second Committee)
(A/CONF.13/L.53 and Corr.1)

Convention on Fishing and Conservation of the Living Resources
of the High Seas

(adopted on 26 April 1958, on the report of the Third Committee)
(A/CONF.13/L.54 and Add.1)

Convention on the Continental Shelf

(adopted on 26 April 1958, on the report of the Fourth Committee)
(A/CONF.13/L.55)

The Conference also adopted the following *Protocol* (annex V) :

Optional Protocol of Signature concerning the compulsory settlement
of disputes

(adopted by the Conference on 26 April 1958)
(A/CONF.13/L.57)

In addition, the Conference adopted the following *Resolutions* (annex VI) (A/CONF.13/L.56) :

Nuclear tests on the high seas

(Resolution adopted on 27 April 1958, on the report of the Second Committee, in connexion with Article 2 of the Convention on the High Seas)

Pollution of the high seas by radioactive material

(Resolution adopted on 27 April 1958, on the report of the Second Committee, relating to Article 25 of the Convention on the High Seas)

International fishery conservation conventions

(Resolution adopted on 25 April 1958, on the report of the Third Committee)

Co-operation in conservation measures

(Resolution adopted on 25 April 1958, on the report of the Third Committee)

Humane killing of marine life

(Resolution adopted on 25 April 1958, on the report of the Third Committee)

Special situations relating to coastal fisheries

(Resolution adopted on 26 April 1958, in connexion with the report of the Third Committee)

Régime of historic waters

(Resolution adopted on 27 April 1958, on the report of the First Committee)

Convening of a second United Nations Conference on the Law of the Sea

(Resolution adopted by the Conference on 27 April 1958)

Tribute to the International Law Commission

(Resolution adopted by the Conference on 27 April 1958)

In witness whereof the Representatives have signed this Final Act.¹

Done at Geneva this twenty-ninth day of April, One thousand nine hundred and fifty-eight, in a single copy in the Chinese, English, French, Russian and Spanish languages, each text being equally authentic. The original texts shall be deposited in the archives of the United Nations Secretariat:

President
Executive Secretary

CONVENTION ON THE TERRITORIAL SEA AND THE CONTIGUOUS ZONE²

*Signed at Geneva, April 29, 1958; open for signature until
October 31, 1958*

*The States Parties to this Convention
Have agreed as follows:*

PART I: TERRITORIAL SEA

SECTION I. GENERAL

ARTICLE 1

1. The sovereignty of a state extends, beyond its land territory and its internal waters, to a belt of sea adjacent to its coast, described as the territorial sea.

2. This sovereignty is exercised subject to the provisions of these articles and to other rules of international law.

ARTICLE 2

The sovereignty of a coastal state extends to the airspace over the territorial sea as well as to its bed and subsoil.

SECTION II. LIMITS OF THE TERRITORIAL SEA

ARTICLE 3

Except where otherwise provided in these articles, the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal state.

¹ The Final Act was signed by the representatives of all the states at the Conference except those for Belgium, Burma, Ireland, Jordan, Republic of Korea, Laos, Luxembourg, Malaya, Paraguay, Philippines, Saudi Arabia, Sweden, Republic of Viet-Nam and Yemen.

² U.N. Doc. A/CONF.13/L.52; reprinted in 38 Dept. of State Bulletin 1111 (1958).

ARTICLE 4

1. In localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured.

2. The drawing of such baselines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the régime of internal waters.

3. Baselines shall not be drawn to and from low-tide elevations, unless lighthouses or similar installations which are permanently above sea level have been built on them.

4. Where the method of straight baselines is applicable under the provisions of paragraph 1, account may be taken, in determining particular baselines, of economic interests peculiar to the region concerned, the reality and the importance of which are clearly evidenced by a long usage.

5. The system of straight baselines may not be applied by a state in such a manner as to cut off from the high seas the territorial sea of another state.

6. The coastal state must clearly indicate straight baselines on charts, to which due publicity must be given.

ARTICLE 5

1. Waters on the landward side of the baseline of the territorial sea form part of the internal waters of the state.

2. Where the establishment of a straight baseline in accordance with Article 4 has the effect of enclosing as internal waters areas which previously had been considered as part of the territorial sea or of the high seas, a right of innocent passage, as provided in Articles 14 to 23, shall exist in those waters.

ARTICLE 6

The outer limit of the territorial sea is the line every point of which is at a distance from the nearest point of the baseline equal to the breadth of the territorial sea.

ARTICLE 7

1. This article relates only to bays the coasts of which belong to a single state.

2. For the purposes of these articles, a bay is a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast. An indentation shall not, however, be regarded as a bay unless its area is as large as, or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of that indentation.

3. For the purpose of measurement, the area of an indentation is that lying between the low-water mark around the shore of the indentation and a line joining the low-water marks of its natural entrance points. Where, because of the presence of islands, an indentation has more than one mouth, the semi-circle shall be drawn on a line as long as the sum total of the lengths of the lines across the different mouths. Islands within an indentation shall be included as if they were part of the water area of the indentation.

4. If the distance between the low-water marks of the natural entrance points of a bay does not exceed twenty-four miles, a closing line may be drawn between these two low-water marks, and the waters enclosed thereby shall be considered as internal waters.

5. Where the distance between the low-water marks of the natural entrance points of a bay exceeds twenty-four miles, a straight baseline of twenty-four miles shall be drawn within the bay in such a manner as to enclose the maximum area of water that is possible with a line of that length.

6. The foregoing provisions shall not apply to so-called "historic" bays, or in any case where the straight baseline system provided for in Article 4 is applied.

ARTICLE 8

For the purpose of delimiting the territorial sea, the outermost permanent harbour works which form an integral part of the harbour system shall be regarded as forming part of the coast.

ARTICLE 9

Roadsteads which are normally used for the loading, unloading and anchoring of ships, and which would otherwise be situated wholly or partly outside the outer limit of the territorial sea, are included in the territorial sea. The coastal state must clearly demarcate such roadsteads and indicate them on charts together with their boundaries, to which due publicity must be given.

ARTICLE 10

1. An island is a naturally-formed area of land, surrounded by water, which is above water at high tide.

2. The territorial sea of an island is measured in accordance with the provisions of these articles.

ARTICLE 11

1. A low-tide elevation is a naturally-formed area of land which is surrounded by and above water at low-tide but submerged at high tide. Where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island, the low-water line on that elevation may be used as the baseline for measuring the breadth of the territorial sea.

2. Where a low-tide elevation is wholly situated at a distance exceeding the breadth of the territorial sea from the mainland or an island, it has no territorial sea of its own.

ARTICLE 12

1. Where the coasts of two states are opposite or adjacent to each other, neither of the two states is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two states is measured. The provisions of this paragraph shall not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two states in a way which is at variance with this provision.

2. The line of delimitation between the territorial seas of two states lying opposite to each other or adjacent to each other shall be marked on large-scale charts officially recognized by the coastal states.

ARTICLE 13

If a river flows directly into the sea, the baseline shall be a straight line across the mouth of the river between points on the low-tide line of its banks.

SECTION III. RIGHT OF INNOCENT PASSAGE

Sub-section A. Rules applicable to all ships

ARTICLE 14

1. Subject to the provisions of these articles, ships of all states, whether coastal or not, shall enjoy the right of innocent passage through the territorial sea.

2. Passage means navigation through the territorial sea for the purpose either of traversing that sea without entering internal waters, or of proceeding to internal waters, or of making for the high seas from internal waters.

3. Passage includes stopping and anchoring, but only insofar as the same are incidental to ordinary navigation or are rendered necessary by *force majeure* or by distress.

4. Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal state. Such passage shall take place in conformity with these articles and with other rules of international law.

5. Passage of foreign fishing vessels shall not be considered innocent if they do not observe such laws and regulations as the coastal state may make and publish in order to prevent these vessels from fishing in the territorial sea.

6. Submarines are required to navigate on the surface and to show their flag.

ARTICLE 15

1. The coastal state must not hamper innocent passage through the territorial sea.

2. The coastal state is required to give appropriate publicity to any dangers to navigation, of which it has knowledge, within its territorial sea.

ARTICLE 16

1. The coastal state may take the necessary steps in its territorial sea to prevent passage which is not innocent.

2. In the case of ships proceeding to internal waters, the coastal state shall also have the right to take the necessary steps to prevent any breach of the conditions to which admission of those ships to those waters is subject.

3. Subject to the provisions of paragraph 4, the coastal state may, without discrimination amongst foreign ships, suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security. Such suspension shall take effect only after having been duly published.

4. There shall be no suspension of the innocent passage of foreign ships through straits which are used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign state.

ARTICLE 17

Foreign ships exercising the right of innocent passage shall comply with the laws and regulations enacted by the coastal state in conformity with these articles and other rules of international law and, in particular, with such laws and regulations relating to transport and navigation.

Sub-section B. Rules applicable to merchant ships

ARTICLE 18

1. No charge may be levied upon foreign ships by reason only of their passage through the territorial sea.

2. Charges may be levied upon a foreign ship passing through the territorial sea as payment only for specific services rendered to the ship. These charges shall be levied without discrimination.

ARTICLE 19

1. The criminal jurisdiction of the coastal state should not be exercised on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connexion with any crime committed on board the ship during its passage, save only in the following cases:

- (a) If the consequences of the crime extend to the coastal state; or
- (b) If the crime is of a kind to disturb the peace of the country or the good order of the territorial sea; or
- (c) If the assistance of the local authorities has been requested by the captain of the ship or by the consul of the country whose flag the ship flies; or
- (d) If it is necessary for the suppression of illicit traffic in narcotic drugs.

2. The above provisions do not affect the right of the coastal state to take any steps authorized by its laws for the purpose of an arrest or investigation on board a foreign ship passing through the territorial sea after leaving internal waters.

3. In the cases provided for in paragraphs 1 and 2 of this article, the coastal state shall, if the captain so requests, advise the consular authority of the flag state before taking any steps, and shall facilitate contact between such authority and the ship's crew. In cases of emergency this notification may be communicated while the measures are being taken.

4. In considering whether or how an arrest should be made, the local authorities shall pay due regard to the interests of navigation.

5. The coastal state may not take any steps on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connexion with any crime committed before the ship entered the territorial sea, if the ship, proceeding from a foreign port, is only passing through the territorial sea without entering internal waters.

ARTICLE 20

1. The coastal state should not stop or divert a foreign ship passing through the territorial sea for the purpose of exercising civil jurisdiction in relation to a person on board the ship.

2. The coastal state may not levy execution against or arrest the ship for the purpose of any civil proceedings, save only in respect of obligations or liabilities assumed or incurred by the ship itself in the course or for the purpose of its voyage through the waters of the coastal state.

3. The provisions of the previous paragraph are without prejudice to the right of the coastal state, in accordance with its laws, to levy execution against or to arrest, for the purpose of any civil proceedings, a foreign ship lying in the territorial sea, or passing through the territorial sea after leaving internal waters.

Sub-section C. Rules applicable to government ships other than warships

ARTICLE 21

The rules contained in Sub-sections A and B shall also apply to government ships operated for commercial purposes.

ARTICLE 22

1. The rules contained in Sub-section A and in Article 18 shall apply to government ships operated for non-commercial purposes.

2. With such exceptions as are contained in the provisions referred to in the preceding paragraph, nothing in these articles affects the immunities which such ships enjoy under these articles or other rules of international law.

Sub-section D. Rule applicable to warships

ARTICLE 23

If any warship does not comply with the regulations of the coastal state concerning passage through the territorial sea and disregards any request for compliance which is made to it, the coastal state may require the warship to leave the territorial sea.

PART II: CONTIGUOUS ZONE

ARTICLE 24

1. In a zone of the high seas contiguous to its territorial sea, the coastal state may exercise the control necessary to:

- (a) Prevent infringement of its customs, fiscal, immigration or sanitary regulations within its territory or territorial sea;
- (b) Punish infringement of the above regulations committed within its territory or territorial sea.

2. The contiguous zone may not extend beyond twelve miles from the baseline from which the breadth of the territorial sea is measured.

3. Where the coasts of two states are opposite or adjacent to each other, neither of the two states is entitled, failing agreement between them to the contrary, to extend its contiguous zone beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of the two states is measured.

PART III: FINAL ARTICLES

ARTICLE 25

The provisions of this Convention shall not affect conventions or other international agreements already in force, as between states parties to them.

ARTICLE 26

This Convention shall, until 31 October 1958, be open for signature by all States Members of the United Nations or of any of the specialized agencies, and by any other state invited by the General Assembly to become a party to the Convention.

ARTICLE 27

This Convention is subject to ratification. The instruments of ratification shall be deposited with the Secretary-General of the United Nations.

ARTICLE 28

This Convention shall be open for accession by any states belonging to any of the categories mentioned in Article 26. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

ARTICLE 29

1. This Convention shall come into force on the thirtieth day following the date of deposit of the twenty-second instrument of ratification or accession with the Secretary-General of the United Nations.

2. For each state ratifying or acceding to the Convention after the deposit of the twenty-second instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after deposit by such state of its instrument of ratification or accession.

ARTICLE 30

1. After the expiration of a period of five years from the date on which this Convention shall enter into force, a request for the revision of this Convention may be made at any time by any Contracting Party by means of a notification in writing addressed to the Secretary-General.

2. The General Assembly of the United Nations shall decide upon the steps, if any, to be taken in respect of such request.

ARTICLE 31

The Secretary-General of the United Nations shall inform all States Members of the United Nations and the other states referred to in Article 26:

- (a) Of signatures to this Convention and of the deposit of instruments of ratification or accession, in accordance with Articles 26, 27 and 28;
- (b) Of the date on which this Convention will come into force, in accordance with Article 29;
- (c) Of requests for revision in accordance with Article 30.

ARTICLE 32

The original of this Convention, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations, who shall send certified copies thereof to all states referred to in Article 26.

In witness whereof the undersigned Plenipotentiaries, being duly authorized thereto by their respective governments, have signed this Convention

Done at Geneva, this twenty-ninth day of April one thousand nine hundred and fifty-eight.

[Here follow signatures on behalf of Argentina, Canada, China, Colombia,¹ Costa Rica, Cuba, Denmark, Dominican Republic, Ghana, Guatemala, Haiti, Iceland, Israel, Nepal, Thailand, Uruguay and Yugoslavia (subject to ratification). The Convention was signed later on behalf of Afghanistan, Australia, Austria, Bolivia, Byelorussia, Ceylon, Czechoslovakia, Finland, the Holy See, Iran,² Ireland, Liberia, New Zealand, Panama, Portugal, Switzerland, Tunisia, Ukraine, the U.S.S.R., the United Kingdom, the United States (Sept. 15), and Venezuela.]

CONVENTION ON THE HIGH SEAS³

*Signed at Geneva, April 29, 1958; open for signature until
October 31, 1958*

The States Parties to this Convention

Desiring to codify the rules of international law relating to the high seas,

Recognizing that the United Nations Conference on the Law of the Sea, held at Geneva from 24 February to 27 April 1958, adopted the following provisions as generally declaratory of established principles of international law,

Have agreed as follows:

ARTICLE 1

The term "high seas" means all parts of the sea that are not included in the territorial sea or in the internal waters of a state.

ARTICLE 2

The high seas being open to all nations, no state may validly purport to subject any part of them to its sovereignty. Freedom of the high seas is exercised under the conditions laid down by these articles and by the

¹ With a declaration as follows:

"With respect to the Convention on the Territorial Sea and the Contiguous Zone, the delegation of Colombia declares that, under article 98 of the Colombian Constitution, authorization by the Senate is required for the passage of foreign troops through Colombian territory and that, by analogy, such authorization is accordingly also required for the passage of foreign warships through Colombian territorial waters."

² With reservation as follows:

"In signing the Convention on the Territorial Sea and the Contiguous Zone, I make the following reservation:

"Article 14. The Iranian Government maintains the objection, on the ground of excess of competence, expressed by its delegation at the twelfth plenary meeting of the Conference on the Law of the Sea on 24 April 1958, to the articles recommended by the Fifth Committee of the Conference and incorporated in part in article 14 of this Convention. The Iranian Government accordingly reserves all rights regarding the contents of this article in so far as it relates to countries having no sea coast."

³ U.N. Doc. A/CONF.13/L.53; reprinted in Dept. of State Bulletin, *loc. cit.* 1115.

other rules of international law. It comprises, *inter alia*, both for coastal and non-coastal states:

- (1) Freedom of navigation;
- (2) Freedom of fishing;
- (3) Freedom to lay submarine cables and pipelines;
- (4) Freedom to fly over the high seas.

These freedoms, and others which are recognized by the general principles of international law, shall be exercised by all states with reasonable regard to the interests of other states in their exercise of the freedom of the high seas.

ARTICLE 3

1. In order to enjoy the freedom of the seas on equal terms with coastal states, states having no seacoast should have free access to the sea. To this end states situated between the sea and a state having no seacoast shall by common agreement with the latter and in conformity with existing international conventions accord:

- (a) To the state having no seacoast, on a basis of reciprocity, free transit through their territory and
- (b) To ships flying the flag of that state treatment equal to that accorded to their own ships, or to the ships of any other states, as regards access to seaports and the use of such ports.

2. States situated between the sea and a state having no seacoast shall settle, by mutual agreement with the latter, and taking into account the rights of the coastal state or state of transit and the special conditions of the state having no seacoast, all matters relating to freedom of transit and equal treatment in ports, in case such states are not already parties to existing international conventions.

ARTICLE 4

Every state, whether coastal or not, has the right to sail ships under its flag on the high seas.

ARTICLE 5

1. Each state shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the state whose flag they are entitled to fly. There must exist a genuine link between the state and the ship; in particular, the state must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.

2. Each state shall issue to ships to which it has granted the right to fly its flag documents to that effect.

ARTICLE 6

1. Ships shall sail under the flag of one state only and, save in exceptional cases expressly provided for in international treaties or in these articles, shall be subject to its exclusive jurisdiction on the high seas. A ship may not change its flag during a voyage or while in a port of call, save in the case of a real transfer of ownership or change in registry.

2. A ship which sails under the flags of two or more states, using them according to convenience, may not claim any of the nationalities in question with respect to any other state, and may be assimilated to a ship without nationality.

ARTICLE 7

The provisions of the preceding articles do not prejudice the question of ships employed on the official service of an intergovernmental organization flying the flag of the organization.

ARTICLE 8

1. Warships on the high seas have complete immunity from the jurisdiction of any state other than the flag state.

2. For the purposes of these articles, the term "warship" means a ship belonging to the naval forces of a state and bearing the external marks distinguishing warships of its nationality, under the command of an officer duly commissioned by the government and whose name appears in the Navy List, and manned by a crew who are under regular naval discipline.

ARTICLE 9

Ships owned or operated by a state and used only on government non-commercial service shall, on the high seas, have complete immunity from the jurisdiction of any state other than the flag state.

ARTICLE 10

1. Every state shall take such measures for ships under its flag as are necessary to ensure safety at sea with regard *inter alia* to:

- (a) The use of signals, the maintenance of communications and the prevention of collisions;
- (b) The manning of ships and labour conditions for crews taking into account the applicable international labour instruments;
- (c) The construction, equipment and seaworthiness of ships.

2. In taking such measures each state is required to conform to generally accepted international standards and to take any steps which may be necessary to ensure their observance.

ARTICLE 11

1. In the event of a collision or of any other incident of navigation concerning a ship on the high seas, involving the penal or disciplinary responsibility of the master or of any other person in the service of the ship, no penal or disciplinary proceedings may be instituted against such persons except before the judicial or administrative authorities either of the flag state or of the state of which such person is a national.

2. In disciplinary matters, the state which has issued a master's certificate or a certificate of competence or license shall alone be competent, after due legal process, to pronounce the withdrawal of such certificates, even if the holder is not a national of the state which issued them.

3. No arrest or detention of the ship, even as a measure of investigation, shall be ordered by any authorities other than those of the flag state.

ARTICLE 12

1. Every state shall require the master of a ship sailing under its flag, insofar as he can do so without serious danger to the ship, the crew or the passengers:

- (a) To render assistance to any person found at sea in danger of being lost;
- (b) To proceed with all possible speed to the rescue of persons in distress if informed of their need of assistance, insofar as such action may reasonably be expected of him;
- (c) After a collision to render assistance to the other ship, her crew and her passengers and, where possible, to inform the other ship of the name of his own ship, her port of registry and the nearest port at which she will call.

2. Every coastal state shall promote the establishment and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and—where circumstances so require—by way of mutual regional arrangements co-operate with neighbouring states for this purpose.

ARTICLE 13

Every state shall adopt effective measures to prevent and punish the transport of slaves in ships authorized to fly its flag, and to prevent the unlawful use of its flag for that purpose. Any slave taking refuge on board any ship, whatever its flag, shall *ipso facto* be free.

ARTICLE 14

All states shall co-operate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any state.

ARTICLE 15

Piracy consists of any of the following acts:

- (1) Any illegal acts of violence, detention or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
 - (a) On the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
 - (b) Against a ship, aircraft, persons or property in a place outside the jurisdiction of any state;
- (2) Any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
- (3) Any act of inciting or of intentionally facilitating an act described in sub-paragraph 1 or sub-paragraph 2 of this article.

ARTICLE 16

The acts of piracy, as defined in Article 15, committed by a warship, government ship or government aircraft whose crew has mutinied and taken control of the ship or aircraft are assimilated to acts committed by a private ship.

ARTICLE 17

A ship or aircraft is considered a pirate ship or aircraft if it is intended by the persons in dominant control to be used for the purpose of committing one of the acts referred to in Article 15. The same applies if the ship or aircraft has been used to commit any such act, so long as it remains under the control of the persons guilty of that act.

ARTICLE 18

A ship or aircraft may retain its nationality although it has become a pirate ship or aircraft. The retention or loss of nationality is determined by the law of the state from which such nationality was derived.

ARTICLE 19

On the high seas, or in any other place outside the jurisdiction of any state, every state may seize a pirate ship or aircraft, or a ship taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the state which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.

ARTICLE 20

Where the seizure of a ship or aircraft on suspicion of piracy has been effected without adequate grounds, the state making the seizure shall be

liable to the state the nationality of which is possessed by the ship or aircraft, for any loss or damage caused by the seizure.

ARTICLE 21

A seizure on account of piracy may only be carried out by warships or military aircraft, or other ships or aircraft on government service authorized to that effect.

ARTICLE 22

1. Except where acts of interference derive from powers conferred by treaty, a warship which encounters a foreign merchant ship on the high seas is not justified in boarding her unless there is reasonable ground for suspecting:

- (a) That the ship is engaged in piracy; or
- (b) That the ship is engaged in the slave trade; or
- (c) That, though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.

2. In the cases provided for in sub-paragraphs (a), (b) and (c) above, the warship may proceed to verify the ship's right to fly its flag. To this end, it may send a boat under the command of an officer to the suspected ship. If suspicion remains after the documents have been checked, it may proceed to a further examination on board the ship, which must be carried out with all possible consideration.

3. If the suspicions prove to be unfounded, and provided that the ship boarded has not committed any act justifying them, it shall be compensated for any loss or damage that may have been sustained.

ARTICLE 23

1. The hot pursuit of a foreign ship may be undertaken when the competent authorities of the coastal state have good reason to believe that the ship has violated the laws and regulations of that state. Such pursuit must be commenced when the foreign ship or one of its boats is within the internal waters or the territorial sea or the contiguous zone of the pursuing state, and may only be continued outside the territorial sea or the contiguous zone if the pursuit has not been interrupted. It is not necessary that, at the time when the foreign ship within the territorial sea or the contiguous zone receives the order to stop, the ship giving the order should likewise be within the territorial sea or the contiguous zone. If the foreign ship is within a contiguous zone, as defined in Article 24 of the Convention on the Territorial Sea and the Contiguous Zone, the pursuit may only be undertaken if there has been a violation of the rights for the protection of which the zone was established.

2. The right of hot pursuit ceases as soon as the ship pursued enters the territorial sea of its own country or of a third state.

3. Hot pursuit is not deemed to have begun unless the pursuing ship has satisfied itself by such practicable means as may be available that the ship pursued or one of its boats or other craft working as a team and using the ship pursued as a mother ship are within the limits of the territorial sea, or as the case may be within the contiguous zone. The pursuit may only be commenced after a visual or auditory signal to stop has been given at a distance which enables it to be seen or heard by the foreign ship.

4. The right of hot pursuit may be exercised only by warships or military aircraft, or other ships or aircraft on government service specially authorized to that effect.

5. Where hot pursuit is effected by an aircraft:

- (a) The provisions of paragraphs 1 to 3 of this article shall apply *mutatis mutandis*;
- (b) The aircraft giving the order to stop must itself actively pursue the ship until a ship or aircraft of the coastal state, summoned by the aircraft, arrives to take over the pursuit, unless the aircraft is itself able to arrest the ship. It does not suffice to justify an arrest on the high seas that the ship was merely sighted by the aircraft as an offender or suspected offender, if it was not both ordered to stop and pursued by the aircraft itself or other aircraft or ships which continue the pursuit without interruption.

6. The release of a ship arrested within the jurisdiction of a state and escorted to a port of that state for the purposes of an enquiry before the competent authorities, may not be claimed solely on the ground that the ship, in the course of its voyage, was escorted across a portion of the high seas, if the circumstances rendered this necessary.

7. Where a ship has been stopped or arrested on the high seas in circumstances which do not justify the exercise of the right of hot pursuit, it shall be compensated for any loss or damage that may have been thereby sustained.

ARTICLE 24

Every state shall draw up regulations to prevent pollution of the seas by the discharge of oil from ships or pipelines or resulting from the exploitation and exploration of the seabed and its subsoil, taking account of existing treaty provisions on the subject.

ARTICLE 25

1. Every state shall take measures to prevent pollution of the seas from the dumping of radioactive waste, taking into account any standards and regulations which may be formulated by the competent international organizations.

2. All states shall co-operate with the competent international organizations in taking measures for the prevention of pollution of the seas or air-

space above, resulting from any activities with radioactive materials or other harmful agents.

ARTICLE 26

1. All states shall be entitled to lay submarine cables and pipelines on the bed of the high seas.

2. Subject to its right to take reasonable measures for the exploration of the continental shelf and the exploitation of its natural resources, the coastal state may not impede the laying or maintenance of such cables or pipelines.

3. When laying such cables or pipelines the state in question shall pay due regard to cables or pipelines already in position on the seabed. In particular, possibilities of repairing existing cables or pipelines shall not be prejudiced.

ARTICLE 27

Every state shall take the necessary legislative measures to provide that the breaking or injury by a ship flying its flag or by a person subject to its jurisdiction of a submarine cable beneath the high seas done wilfully or through culpable negligence, in such a manner as to be liable to interrupt or obstruct telegraphic or telephonic communications, and similarly the breaking or injury of a submarine pipeline or high-voltage power cable shall be a punishable offence. This provision shall not apply to any break or injury caused by persons who acted merely with the legitimate object of saving their lives or their ships, after having taken all necessary precautions to avoid such break or injury.

ARTICLE 28

Every state shall take the necessary legislative measures to provide that, if persons subject to its jurisdiction who are the owners of a cable or pipeline beneath the high seas, in laying or repairing that cable or pipeline, cause a break in or injury to another cable or pipeline, they shall bear the cost of the repairs.

ARTICLE 29

Every state shall take the necessary legislative measures to ensure that the owners of ships who can prove that they have sacrificed an anchor, a net or any other fishing gear, in order to avoid injuring a submarine cable or pipeline, shall be indemnified by the owner of the cable or pipeline, provided that the owner of the ship has taken all reasonable precautionary measures beforehand.

ARTICLE 30

The provisions of this Convention shall not affect conventions or other international agreements already in force, as between states parties to them.

ARTICLE 31

This Convention shall, until 31 October 1958, be open for signature by all States Members of the United Nations or of any of the specialized agencies, and by any other state invited by the General Assembly to become a party to the Convention.

ARTICLE 32

This Convention is subject to ratification. The instruments of ratification shall be deposited with the Secretary-General of the United Nations.

ARTICLE 33

This Convention shall be open for accession by any states belonging to any of the categories mentioned in Article 31. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

ARTICLE 34

1. This Convention shall come into force on the thirtieth day following the date of deposit of the twenty-second instrument of ratification or accession with the Secretary-General of the United Nations.

2. For each state ratifying or acceding to the Convention after the deposit of the twenty-second instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after deposit by such state of its instrument of ratification or accession.

ARTICLE 35

1. After the expiration of a period of five years from the date on which this Convention shall enter into force, a request for the revision of this Convention may be made at any time by any Contracting Party by means of a notification in writing addressed to the Secretary-General.

2. The General Assembly of the United Nations shall decide upon the steps, if any, to be taken in respect of such request.

ARTICLE 36

The Secretary-General of the United Nations shall inform all States Members of the United Nations and the other states referred to in Article 31:

- (a) Of signatures to this Convention and of the deposit of instruments of ratification or accession, in accordance with Articles 31, 32 and 33;
- (b) Of the date on which this Convention will come into force, in accordance with Article 34;
- (c) Of requests for revision in accordance with Article 35.

ARTICLE 37

The original of this Convention, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with

the Secretary-General of the United Nations, who shall send certified copies thereof to all states referred to in Article 31.

In witness whereof the undersigned Plenipotentiaries, being duly authorized thereto by their respective governments, have signed this Convention.

Done at Geneva, this twenty-ninth day of April one thousand nine hundred and fifty-eight.

[Here follow signatures on behalf of Argentina, Canada, China, Colombia, Costa Rica, Cuba, Denmark, Dominican Republic, Ghana, Guatemala, Haiti, Iceland, Israel, Nepal, Thailand, Uruguay, and Yugoslavia (subject to ratification). The Convention was signed later on behalf of Afghanistan, Australia, Austria, Bolivia, Byelorussia, Ceylon, Czechoslovakia, Finland, France, German Federal Republic, the Holy See, Indonesia, Iran,¹ Ireland, Lebanon, Liberia, New Zealand, Panama, Portugal, Switzerland, Tunisia, Ukraine, the U.S.S.R., the United Kingdom, the United States (Sept. 15), and Venezuela.]

CONVENTION ON FISHING AND CONSERVATION OF THE LIVING RESOURCES OF THE HIGH SEAS²

*Signed at Geneva, April 29, 1958; open for signature until
October 31, 1958*

The States Parties to this Convention,

Considering that the development of modern techniques for the exploitation of the living resources of the sea, increasing man's ability to meet the need of the world's expanding population for food, has exposed some of these resources to the danger of being over-exploited,

Considering also that the nature of the problems involved in the conservation of the living resources of the high seas is such that there is a clear necessity that they be solved, whenever possible, on the basis of international co-operation through the concerted action of all the states concerned,

Have agreed as follows:

¹ With reservations as follow:

"In signing the Convention on the High Seas, I make the following reservations:

"Article 2. With respect to the words 'no State may validly purport to subject any part of them to its sovereignty', it shall be understood that this prohibition does not apply to the continental shelf, which is governed by article 2 of the Convention on the Continental Shelf.

"Articles 2, 3 and 4. The Iranian Government maintains the objection on the ground of excess of competence, expressed by its delegation at the twelfth plenary meeting of the Conference on the Law of the Sea on 24 April 1958, to the articles recommended by the Fifth Committee of the Conference and incorporated in the afore-mentioned articles of the Convention on the High Seas. The Iranian Government accordingly reserves all right regarding the contents of these articles in so far as they relate to countries having no sea coast.

"Article 2(3)—article 26, paragraphs 1 and 2. Application of the provisions of these articles relating to the laying of submarine cables and pipelines shall be subject to the authorization of the coastal State, in so far as the continental shelf is concerned."

² U.N. Doc. A/CONF.13/L.54; reprinted in Dept. of State Bulletin, *loc. cit.* 1118.

ARTICLE 1

1. All states have the right for their nationals to engage in fishing on the high seas, subject (a) to their treaty obligations, (b) to the interests and rights of coastal states as provided for in this Convention, and (c) to the provisions contained in the following articles concerning conservation of the living resources of the high seas.

2. All states have the duty to adopt, or to co-operate with other states in adopting, such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas.

ARTICLE 2

As employed in this Convention, the expression "conservation of the living resources of the high seas" means the aggregate of the measures rendering possible the optimum sustainable yield from those resources so as to secure a maximum supply of food and other marine products. Conservation programmes should be formulated with a view to securing in the first place a supply of food for human consumption.

ARTICLE 3

A state whose nationals are engaged in fishing any stock or stocks of fish or other living marine resources in any area of the high seas where the nationals of other states are not thus engaged shall adopt, for its own nationals, measures in that area when necessary for the purpose of the conservation of the living resources affected.

ARTICLE 4

1. If the nationals of two or more states are engaged in fishing the same stock or stocks of fish or other living marine resources in any area or areas of the high seas, these states shall, at the request of any of them, enter into negotiations with a view to prescribing by agreement for their nationals the necessary measures for the conservation of the living resources affected.

2. If the states concerned do not reach agreement within twelve months, any of the parties may initiate the procedure contemplated by Article 9.

ARTICLE 5

1. If, subsequent to the adoption of the measures referred to in Articles 3 and 4, nationals of other states engage in fishing the same stock or stocks of fish or other living marine resources in any area or areas of the high seas, the other states shall apply the measures, which shall not be discriminatory in form or in fact, to their own nationals not later than seven months after the date on which the measures shall have been notified to the Director-General of the Food and Agriculture Organization of the United Nations. The Director-General shall notify such measures to any state

which so requests and, in any case, to any state specified by the state initiating the measure.

2. If these other states do not accept the measures so adopted and if no agreement can be reached within twelve months, any of the interested parties may initiate the procedure contemplated by Article 9. Subject to paragraph 2 of Article 10, the measures adopted shall remain obligatory pending the decision of the special commission.

ARTICLE 6

1. A coastal state has a special interest in the maintenance of the productivity of the living resources in any area of the high seas adjacent to its territorial sea.

2. A coastal state is entitled to take part on an equal footing in any system of research and regulation for purposes of conservation of the living resources of the high seas in that area, even though its nationals do not carry on fishing there.

3. A state whose nationals are engaged in fishing in any area of the high seas adjacent to the territorial sea of a coastal state shall, at the request of that coastal state, enter into negotiations with a view to prescribing by agreement the measures necessary for the conservation of the living resources of the high seas in that area.

4. A state whose nationals are engaged in fishing in any area of the high seas adjacent to the territorial sea of a coastal state shall not enforce conservation measures in that area which are opposed to those which have been adopted by the coastal state, but may enter into negotiations with the coastal state with a view to prescribing by agreement the measures necessary for the conservation of the living resources of the high seas in that area.

5. If the states concerned do not reach agreement with respect to conservation measures within twelve months, any of the parties may initiate the procedure contemplated by Article 9.

ARTICLE 7

1. Having regard to the provisions of paragraph 1 of Article 6, any coastal state may, with a view to the maintenance of the productivity of the living resources of the sea, adopt unilateral measures of conservation appropriate to any stock of fish or other marine resources in any area of the high seas adjacent to its territorial sea, provided that negotiations to that effect with the other states concerned have not led to an agreement within six months.

2. The measures which the coastal state adopts under the previous paragraph shall be valid as to other states only if the following requirements are fulfilled:

- (a) That there is a need for urgent application of conservation measures in the light of the existing knowledge of the fishery;

- (b) That the measures adopted are based on appropriate scientific findings;
- (c) That such measures do not discriminate in form or in fact against foreign fishermen.

3. These measures shall remain in force pending the settlement, in accordance with the relevant provisions of this Convention, of any disagreement as to their validity.

4. If the measures are not accepted by the other states concerned, any of the parties may initiate the procedure contemplated by Article 9. Subject to paragraph 2 of Article 10, the measures adopted shall remain obligatory pending the decision of the special commission.

5. The principles of geographical demarcation as defined in Article 12 of the Convention on the Territorial Sea and the Contiguous Zone shall be adopted when coasts of different states are involved.

ARTICLE 8

1. Any state which, even if its nationals are not engaged in fishing in an area of the high seas not adjacent to its coast, has a special interest in the conservation of the living resources of the high seas in that area, may request the state or states whose nationals are engaged in fishing there to take the necessary measures of conservation under Articles 3 and 4 respectively, at the same time mentioning the scientific reasons which in its opinion make such measures necessary, and indicating its special interest.

2. If no agreement is reached within twelve months, such state may initiate the procedure contemplated by Article 9.

ARTICLE 9

1. Any dispute which may arise between states under Articles 4, 5, 6, 7 and 8 shall, at the request of any of the parties, be submitted for settlement to a special commission of five members, unless the parties agree to seek a solution by another method of peaceful settlement, as provided for in Article 33 of the Charter of the United Nations.

2. The members of the commission, one of whom shall be designated as chairman, shall be named by agreement between the states in dispute within three months of the request for settlement in accordance with the provisions of this article. Failing agreement they shall, upon the request of any state party, be named by the Secretary-General of the United Nations, within a further three-month period, in consultation with the states in dispute and with the President of the International Court of Justice and the Director-General of the Food and Agriculture Organization of the United Nations, from amongst well-qualified persons being nationals of states not involved in the dispute and specializing in legal, administrative or scientific questions relating to fisheries, depending upon the nature of the dispute to be settled. Any vacancy arising after the original appointment shall be filled in the same manner as provided for the initial selection.

3. Any state party to proceedings under these articles shall have the right to name one of its nationals to the special commission, with the right to participate fully in the proceedings on the same footing as a member of the commission but without the right to vote or to take part in the writing of the commission's decision.

4. The commission shall determine its own procedure, assuring each party to the proceedings a full opportunity to be heard and to present its case. It shall also determine how the costs and expenses shall be divided between the parties to the dispute, failing agreement by the parties on this matter.

5. The special commission shall render its decision within a period of five months from the time it is appointed unless it decides, in case of necessity, to extend the time limit for a period not exceeding three months.

6. The special commission shall, in reaching its decisions, adhere to these articles and to any special agreements between the disputing parties regarding settlement of the dispute.

7. Decisions of the commission shall be by majority vote.

ARTICLE 10

1. The special commission shall, in disputes arising under Article 7, apply the criteria listed in paragraph 2 of that article. In disputes under Articles 4, 5, 6 and 8, the commission shall apply the following criteria, according to the issues involved in the dispute:

(a) Common to the determination of disputes arising under Articles 4, 5 and 6 are the requirements:

- (i) That scientific findings demonstrate the necessity of conservation measures;
- (ii) That the specific measures are based on scientific findings and are practicable; and
- (iii) That the measures do not discriminate, in form or in fact, against fishermen of other states.

(b) Applicable to the determination of disputes arising under Article 8 is the requirement that scientific findings demonstrate the necessity for conservation measures, or that the conservation programme is adequate, as the case may be.

2. The special commission may decide that pending its award the measures in dispute shall not be applied, provided that, in the case of disputes under Article 7, the measures shall only be suspended when it is apparent to the commission on the basis of *prima facie* evidence that the need for the urgent application of such measures does not exist.

ARTICLE 11

The decisions of the special commission shall be binding on the states concerned and the provisions of paragraph 2 of Article 94 of the Charter of the United Nations shall be applicable to those decisions. If the de-

cisions are accompanied by any recommendations, they shall receive the greatest possible consideration.

ARTICLE 12

1. If the factual basis of the award of the special commission is altered by substantial changes in the conditions of the stock or stocks of fish or other living marine resources or in methods of fishing, any of the states concerned may request the other states to enter into negotiations with a view to prescribing by agreement the necessary modifications in the measures of conservation.

2. If no agreement is reached within a reasonable period of time, any of the states concerned may again resort to the procedure contemplated by Article 9 provided that at least two years have elapsed from the original award.

ARTICLE 13

1. The regulation of fisheries conducted by means of equipment embedded in the floor of the sea in areas of the high seas adjacent to the territorial sea of a state may be undertaken by that state where such fisheries have long been maintained and conducted by its nationals, provided that non-nationals are permitted to participate in such activities on an equal footing with nationals except in areas where such fisheries have by long usage been exclusively enjoyed by such nationals. Such regulations will not, however, affect the general status of the areas as high seas.

2. In this article, the expression "fisheries conducted by means of equipment embedded in the floor of the sea" means those fisheries using gear with supporting members embedded in the sea floor, constructed on a site and left there to operate permanently, or if removed, restored each season on the same site.

ARTICLE 14

In Articles 1, 3, 4, 5, 6 and 8, the term "nationals" means fishing boats or craft of any size having the nationality of the state concerned, according to the law of that state, irrespective of the nationality of the members of their crews.

ARTICLE 15

This Convention shall, until 31 October 1958, be open for signature by all States Members of the United Nations or of any of the specialized agencies, and by any other state invited by the General Assembly to become a party to the Convention.

ARTICLE 16

This Convention is subject to ratification. The instruments of ratification shall be deposited with the Secretary-General of the United Nations.

ARTICLE 17

This Convention shall be open for accession by any states belonging to any of the categories mentioned in Article 15. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

ARTICLE 18

1. This Convention shall come into force on the thirtieth day following the date of deposit of the twenty-second instrument of ratification or accession with the Secretary-General of the United Nations.

2. For each state ratifying or acceding to the Convention after the deposit of the twenty-second instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after deposit by such state of its instrument of ratification or accession.

ARTICLE 19

1. At the time of signature, ratification or accession, any state may make reservations to articles of the Convention other than to Articles 6, 7, 9, 10, 11 and 12 inclusive.

2. Any Contracting State making a reservation in accordance with the preceding paragraph may at any time withdraw the reservation by a communication to that effect addressed to the Secretary-General of the United Nations.

ARTICLE 20

1. After the expiration of a period of five years from the date on which this Convention shall enter into force, a request for the revision of this Convention may be made at any time by any Contracting Party by means of a notification in writing addressed to the Secretary-General.

2. The General Assembly of the United Nations shall decide upon the steps, if any, to be taken in respect of such request.

ARTICLE 21

The Secretary-General of the United Nations shall inform all States Members of the United Nations and the other states referred to in Article 15:

- (a) Of signatures to this Convention and of the deposit of instruments of ratification or accession, in accordance with Articles 15, 16 and 17;
- (b) Of the date on which this Convention will come into force, in accordance with Article 18;
- (c) Of requests for revision in accordance with Article 20;
- (d) Of reservations to this Convention, in accordance with Article 19.

ARTICLE 22

The original of this Convention, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the

Secretary-General of the United Nations, who shall send certified copies thereof to all states referred to in Article 15.

In witness whereof the undersigned Plenipotentiaries, being duly authorized thereto by their respective governments, have signed this Convention.

Done at Geneva, this twenty-ninth day of April one thousand nine hundred and fifty-eight.

[Here follow signatures on behalf of Argentina, Canada, China, Colombia, Costa Rica, Cuba, Denmark, Dominican Republic, Ghana, Haiti, Iceland, Israel, Nepal, Thailand, Uruguay and Yugoslavia (subject to ratification). The Convention was signed later on behalf of Afghanistan, Australia, Bolivia, Ceylon, Finland, France, Indonesia, Iran, Ireland, Lebanon, Liberia, New Zealand, Panama, Portugal, Switzerland, Tunisia, the United Kingdom, the United States (Sept. 15), and Venezuela.]

CONVENTION ON THE CONTINENTAL SHELF¹

*Signed at Geneva, April 29, 1958; open for signature until
October 31, 1958*

*The States Parties to this Convention
Have agreed as follows:*

ARTICLE 1

For the purpose of these articles, the term "continental shelf" is used as referring (a) to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas; (b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands.

ARTICLE 2

1. The coastal state exercises over the continental shelf sovereign rights / for the purpose of exploring it and exploiting its natural resources.

2. The rights referred to in paragraph 1 of this article are exclusive in the sense that if the coastal state does not explore the continental shelf or exploit its natural resources, no one may undertake these activities, or make a claim to the continental shelf, without the express consent of the coastal state.

3. The rights of the coastal state over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation.

4. The natural resources referred to in these articles consist of the mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the

¹ U.N. Doc. A/CONF.13/L.55; reprinted in Dept. of State Bulletin, *loc. cit.* 1121.

seabed or are unable to move except in constant physical contact with the seabed or the subsoil.

ARTICLE 3

The rights of the coastal state over the continental shelf do not affect the legal status of the superjacent waters as high seas, or that of the airspace above those waters.

ARTICLE 4

Subject to its right to take reasonable measures for the exploration of the continental shelf and the exploitation of its natural resources, the coastal state may not impede the laying or maintenance of submarine cables or pipelines on the continental shelf.

ARTICLE 5

1. The exploration of the continental shelf and the exploitation of its natural resources must not result in any unjustifiable interference with navigation, fishing or the conservation of the living resources of the sea, nor result in any interference with fundamental oceanographic or other scientific research carried out with the intention of open publication.

2. Subject to the provisions of paragraphs 1 and 6 of this article, the coastal state is entitled to construct and maintain or operate on the continental shelf installations and other devices necessary for its exploration and the exploitation of its natural resources, and to establish safety zones around such installations and devices and to take in those zones measures necessary for their protection.

3. The safety zones referred to in paragraph 2 of this article may extend to a distance of 500 metres around the installations and other devices which have been erected, measured from each point of their outer edge. Ships of all nationalities must respect these safety zones.

4. Such installations and devices, though under the jurisdiction of the coastal state, do not possess the status of islands. They have no territorial sea of their own, and their presence does not affect the delimitation of the territorial sea of the coastal state.

5. Due notice must be given of the construction of any such installations, and permanent means for giving warning of their presence must be maintained. Any installations which are abandoned or disused must be entirely removed.

6. Neither the installations or devices, nor the safety zones around them, may be established where interference may be caused to the use of recognized sea lanes essential to international navigation.

7. The coastal state is obliged to undertake, in the safety zones, all appropriate measures for the protection of the living resources of the sea from harmful agents.

8. The consent of the coastal state shall be obtained in respect of any research concerning the continental shelf and undertaken there. Nevertheless, the coastal state shall not normally withhold its consent if the

request is submitted by a qualified institution with a view to purely scientific research into the physical or biological characteristics of the continental shelf, subject to the proviso that the coastal state shall have the right, if it so desires, to participate or to be represented in the research, and that in any event the results shall be published.

ARTICLE 6

1. Where the same continental shelf is adjacent to the territories of two or more states whose coasts are opposite each other, the boundary of the continental shelf appertaining to such states shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line, every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each state is measured.

2. Where the same continental shelf is adjacent to the territories of two adjacent states, the boundary of the continental shelf shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary shall be determined by application of the principle of equidistance from the nearest points of the baselines from which the breadth of the territorial sea of each state is measured.

3. In delimiting the boundaries of the continental shelf, any lines which are drawn in accordance with the principles set out in paragraphs 1 and 2 of this article should be defined with reference to charts and geographical features as they exist at a particular date, and reference should be made to fixed permanent identifiable points on the land.

ARTICLE 7

The provisions of these articles shall not prejudice the right of the coastal state to exploit the subsoil by means of tunnelling irrespective of the depth of water above the subsoil.

ARTICLE 8

This Convention shall, until 31 October 1958, be open for signature by all States Members of the United Nations or of any of the specialized agencies, and by any other state invited by the General Assembly to become a party to the Convention.

ARTICLE 9

This Convention is subject to ratification. The instruments of ratification shall be deposited with the Secretary-General of the United Nations.

ARTICLE 10

This Convention shall be open for accession by any states belonging to any of the categories mentioned in Article 8. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

ARTICLE 11

1. This Convention shall come into force on the thirtieth day following the date of deposit of the twenty-second instrument of ratification or accession with the Secretary-General of the United Nations.

2. For each state ratifying or acceding to the Convention after the deposit of the twenty-second instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after deposit by such state of its instrument of ratification or accession.

ARTICLE 12

1. At the time of signature, ratification or accession, any state may make reservations to articles of the Convention other than to Articles 1 to 3 inclusive.

2. Any Contracting State making a reservation in accordance with the preceding paragraph may at any time withdraw the reservation by a communication to that effect addressed to the Secretary-General of the United Nations.

ARTICLE 13

1. After the expiration of a period of five years from the date on which this Convention shall enter into force, a request for the revision of this Convention may be made at any time by any Contracting Party by means of a notification in writing addressed to the Secretary-General.

2. The General Assembly of the United Nations shall decide upon the steps, if any, to be taken in respect of such request.

ARTICLE 14

The Secretary-General of the United Nations shall inform all States Members of the United Nations and the other states referred to in Article 8:

- (a) Of signatures to this Convention and of the deposit of instruments of ratification or accession, in accordance with Articles 8, 9 and 10.
- (b) Of the date on which this Convention will come into force, in accordance with Article 11.
- (c) Of requests for revision in accordance with Article 13.
- (d) Of reservations to this Convention, in accordance with Article 12.

ARTICLE 15

The original of this Convention, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations, who shall send certified copies thereof to all states referred to in Article 8.

In witness whereof the undersigned Plenipotentiaries, being duly authorised thereto by their respective governments, have signed this Convention.

Done at Geneva, this twenty-ninth day of April one thousand nine hundred and fifty-eight.

[Here follow signatures on behalf of Argentina, Canada, China, Colombia, Costa Rica, Cuba, Denmark, Dominican Republic, Ghana, Guatemala, Haiti, Iceland, Israel, Nepal, Thailand, Uruguay and Yugoslavia (subject to ratification). The Convention was signed later on behalf of Afghanistan, Australia, Bolivia, Ceylon, Finland, German Federal Republic, Indonesia, Iran,¹ Ireland, Lebanon, Liberia, New Zealand, Panama, Portugal, Switzerland, Tunisia, the United Kingdom, the United States (Sept. 15), and Venezuela.]

OPTIONAL PROTOCOL OF SIGNATURE CONCERNING THE COMPULSORY SETTLEMENT OF DISPUTES²

Signed at Geneva, April 29, 1958

The States Parties to this Protocol and to any one or more of the Conventions on the Law of the Sea adopted by the United Nations Conference on the Law of the Sea held at Geneva from 24 February 1958 to 27 April 1958,

Expressing their wish to resort, in all matters concerning them in respect of any dispute arising out of the interpretation or application of any article of any Convention on the Law of the Sea of 29 April 1958, to the compulsory jurisdiction of the International Court of Justice, unless some other form of settlement is provided in the Convention or has been agreed upon by the Parties within a reasonable period,

Have agreed as follows:

ARTICLE I

Disputes arising out of the interpretation or application of any Convention on the Law of the Sea shall lie within the compulsory jurisdiction of the International Court of Justice, and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to this Protocol.

ARTICLE II

This undertaking relates to all the provisions of any Convention on the Law of the Sea except, in the Convention on Fishing and Conservation of the Living Resources of the High Seas, Articles 4, 5, 6, 7 and 8, to which Articles 9, 10, 11 and 12 of that Convention remain applicable.

¹ With reservations as follow:

"In signing this Convention on the Continental Shelf, I am instructed by the Iranian Government to make the following reservations:

"(a) *Article 4*: with respect to the phrase 'the Coastal State may not impede the laying or maintenance of submarine cables or pipe-lines on the continental shelf', the Iranian Government reserves its right to allow or not to allow the laying or maintenance of submarine cables or pipe-lines on its continental shelf.

"(b) *Article 6*: with respect to the phrase 'and unless another boundary line is justified by special circumstances' included in paragraphs 1 and 2 of this article, the Iranian Government accepts this phrase on the understanding that one method of determining the boundary line in special circumstances would be that of measurement from the high water mark."

² U.N. Doc. A/CONF.13/L.57; reprinted in Dept. of State Bulletin, *loc. cit.* 1123.

ARTICLE III

The Parties may agree, within a period of two months after one party has notified its opinion to the other that a dispute exists, to resort not to the Court but to an arbitral tribunal. After the expiry of the said period, either Party to this Protocol may bring the dispute before the Court by an application.

ARTICLE IV

1. Within the same period of two months, the Parties to this Protocol may agree to adopt a conciliation procedure before resorting to the Court.

2. The conciliation commission shall make its recommendations within five months after its appointment. If its recommendations are not accepted by the parties to the dispute within two months after they have been delivered, either party may bring the dispute before the Court by an application.

ARTICLE V

This Protocol shall remain open for signature by all states who become parties to any Convention on the Law of the Sea adopted by the United Nations Conference on the Law of the Sea and is subject to ratification, where necessary according to the constitutional requirements of the signatory states.

ARTICLE VI

The Secretary-General of the United Nations shall inform all states who became parties to any Convention on the Law of the Sea of signatures to this Protocol and of the deposit of instruments of ratification in accordance with Article V.

ARTICLE VII

The original of this Protocol, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations, who shall send certified copies thereof to all states referred to in Article V.

In witness whereof the undersigned Plenipotentiaries, being duly authorized thereto by their respective governments, have signed this Protocol.

Done at Geneva, this twenty-ninth day of April one thousand nine hundred and fifty-eight.

[Here follow signatures on behalf of Canada (subject to ratification), China, Colombia,³ Costa Rica, Cuba, Denmark (subject to ratification),

³ With reservation as follows:

“In signing the Optional Protocol, the delegation of Colombia reserves the obligations of Colombia arising out of conventions concerning the peaceful settlement of disputes which Colombia has ratified and out of any previous conventions concerning the same subject which Colombia may ratify.”

Dominican Republic, Ghana, Haiti, Israel (*ad referendum*), Nepal, Uruguay and Yugoslavia (subject to ratification). The Convention was signed later on behalf of Austria, Bolivia, Ceylon, Finland, France, German Federal Republic, the Holy See, Indonesia, Liberia, New Zealand, Panama, Portugal, Switzerland (subject to ratification), the United Kingdom, and the United States (Sept. 15).]

RESOLUTIONS ADOPTED BY THE CONFERENCE¹

NUCLEAR TESTS ON THE HIGH SEAS

(Adopted on April 27, 1958, on the report of the Second Committee, in connexion with Article 2 of the Convention on the High Seas)

The United Nations Conference on the Law of the Sea,

Recalling that the Conference has been convened by the General Assembly of the United Nations in accordance with resolution 1105 (XI) of 21 February 1957,

Recognizing that there is a serious and genuine apprehension on the part of many states that nuclear explosions constitute an infringement of the freedom of the seas,

Recognizing that the question of nuclear tests and production is still under review by the General Assembly under various resolutions on the subject and by the Disarmament Commission, and is at present under constant review and discussion by the governments concerned,

Decides to refer this matter to the General Assembly for appropriate action.

POLLUTION OF THE HIGH SEAS BY RADIOACTIVE MATERIALS

(Adopted April 27, 1958, on the report of the Second Committee, relating to Article 25 of the Convention on the High Seas)

The United Nations Conference on the Law of the Sea,

Recognizing the need for international action in the field of disposal of radioactive wastes in the sea,

Taking into account action which has been proposed by various national and international bodies and studies which have been published on the subject,

Noting that the International Commission for Radiological Protection has made recommendations regarding the maximum permissible concentration of radio-isotopes in the human body and the maximum permissible concentration in air and water,

Recommends that the International Atomic Energy Agency, in consultation with existing groups and established organs having acknowledged competence in the field of radiological protection, should pursue whatever studies and take whatever action is necessary to assist states in controlling

¹ U.N. Doc. A/CONF.13/L.56; reprinted in Dept. of State Bulletin, *loc. cit.* 1124.

the discharge or release of radioactive materials to the sea, in promulgating standards, and in drawing up internationally acceptable regulations to prevent pollution of the sea by radioactive materials in amounts which would adversely affect man and his marine resources.

INTERNATIONAL FISHERY CONSERVATION CONVENTIONS

(Adopted April 25, 1958, on the report of the Third Committee)

The United Nations Conference on the Law of the Sea,

Taking note of the opinion of the International Technical Conference on the Conservation of the Living Resources of the Sea, held in Rome in April/May 1955, as expressed in paragraph 43 of its report, as to the efficacy of international conservation organizations in furthering the conservation of the living resources of the sea,

Believing that such organizations are valuable instruments for the co-ordination of scientific effort upon the problem of fisheries and for the making of agreements upon conservation measures,

Recommends:

1. That states concerned should co-operate in establishing the necessary conservation régime through the medium of such organizations covering particular areas of the high seas or species of living marine resources and conforming in other respects with the recommendations contained in the report of the Rome Conference;

2. That these organizations should be used so far as practicable for the conduct of the negotiations between states envisaged under Articles 4, 5, 6 and 7 of the Convention on Fishing and Conservation of the Living Resources of the High Seas, for the resolution of any disagreements and for the implementation of agreed measures of conservation.

CO-OPERATION IN CONSERVATION MEASURES

(Adopted April 25, 1958, on the report of the Third Committee)

The United Nations Conference on the Law of the Sea,

Taking note of the opinion of the International Technical Conference on the Conservation of the Living Resources of the Sea, held in Rome in April/May 1955, as reported in paragraphs 43 (a), 54 and others of its report, that any effective conservation management system must have the participation of all states engaged in substantial exploitation of the stock or stocks of living marine organisms which are the object of the conservation management system or having a special interest in the conservation of that stock or stocks,

Recommends to the coastal states that, in the cases where a stock or stocks of fish or other living marine resources inhabit both the fishing areas under their jurisdiction and areas of the adjacent high seas, they should

co-operate with such international conservation organizations as may be responsible for the development and application of conservation measures in the adjacent high seas, in the adoption and enforcement, as far as practicable, of the necessary conservation measures on fishing areas under their jurisdiction.

HUMANE KILLING OF MARINE LIFE

(Adopted April 25, 1958, on the report of the Third Committee)

The United Nations Conference on the Law of the Sea,

Requests states to prescribe, by all means available to them, those methods for the capture and killing of marine life, especially of whales and seals, which will spare them suffering to the greatest extent possible.

SPECIAL SITUATIONS RELATING TO COASTAL FISHERIES

(Adopted April 26, 1958, on the report of the Third Committee)

The United Nations Conference on the Law of the Sea,

Having considered the situation of countries or territories whose people are overwhelmingly dependent upon coastal fisheries for their livelihood or economic development,

Having considered also the situation of countries whose coastal population depends primarily on coastal fisheries for the animal protein of its diet and whose fishing methods are mainly limited to local fishing from small boats,

Recognizing that such situations call for exceptional measures befitting particular needs,

Considering that, because of the limited scope and exceptional nature of those situations, any measures adopted to meet them would be complementary to provisions incorporated in a universal system of international law,

Believing that states should collaborate to secure just treatment of such situations by regional agreements or by other means of international co-operation,

Recommends:

1. That where, for the purpose of conservation, it becomes necessary to limit the total catch of a stock or stocks of fish in an area of the high seas adjacent to the territorial sea of a coastal state, any other states fishing in that area should collaborate with the coastal state to secure just treatment of such situation, by establishing agreed measures which shall recognize any preferential requirements of the coastal state resulting from its dependence upon the fishery concerned while having regard to the interests of the other states;

2. That appropriate conciliation and arbitral procedures shall be established for the settlement of any disagreement.

REGIME OF HISTORIC WATERS

(Adopted April 27, 1958, on the report of the First Committee)

The United Nations Conference on the Law of the Sea,

Considering that the International Law Commission has not provided for the régime of historic waters, including historic bays,

Recognizing the importance of the juridical status of such areas,

Requests the General Assembly of the United Nations to arrange for the study of the juridical régime of historic waters, including historic bays, and for the communication of the results of such study to all States Members of the United Nations.

CONVENING OF A SECOND UNITED NATIONS CONFERENCE
ON THE LAW OF THE SEA

(Adopted April 27, 1958)

The United Nations Conference on the Law of the Sea,

Considering that, on the basis of the report prepared by the International Law Commission, it has approved agreements and other instruments on the régime applicable to fishing and the conservation of the living resources of the high seas, the exploration and exploitation of the natural resources of the continental shelf and other matters pertaining to the general régime of the high seas and to the free access of land-locked states to the sea,

Considering that it has not been possible to reach agreement on the breadth of the territorial sea and some other matters which were raised in connexion with this problem,

Recognizing that, although agreements have been reached on the régime applicable to fishing and the conservation of the living resources of the high seas, it has not been possible, in those agreements, to settle certain aspects of a number of inherently complex questions,

Recognizing the desirability of making further efforts, at an appropriate time, to reach agreement on those questions relating to the international law of the sea which have been left unsettled,

Requests the General Assembly of the United Nations to study, at its thirteenth session (1958), the advisability of convening a second international conference of plenipotentiaries for further consideration of the questions left unsettled by the present Conference.

TRIBUTE TO THE INTERNATIONAL LAW COMMISSION

(Adopted April 27, 1958)

The United Nations Conference on the Law of the Sea,
on the conclusion of its proceedings,

Resolves to pay a tribute of gratitude, respect and admiration to the International Law Commission for its excellent work in the matter of the codification and development of international law, in the form of various drafts and commentaries of great juridical value.

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[Abbreviations: *AJIL*, American Journal of International Law; *ASIL*, American Society of International Law; *BR*, Book Review; *CN*, Notes and Comments; *Ed*, Editorial Comment; *I.C.J.*, International Court of Justice; *I.L.C.*, International Law Commission; *JD*, Judicial Decision; *LA*, Leading Article]

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